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# Revival of Roosevelt: Analyzing Expansion of the Supreme Court of North Carolina in Light of the Resurgence of State "Court-Packing" Plans

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# REVIVAL OF ROOSEVELT: ANALYZING EXPANSION OF THE SUPREME COURT OF NORTH CAROLINA IN LIGHT OF THE RESURGENCE OF STATE “COURT-PACKING” PLANS\*

INTRODUCTION .....	1127
I. COURT-PACKING LEGISLATION IN THE UNITED STATES .....	1131
A. <i>President Roosevelt’s 1937 Court-Packing Plan</i> .....	1131
B. <i>The Recent Resurgence of State Court-Packing</i> .....	1136
1. Unsuccessful Attempts .....	1136
2. Georgia and Arizona’s 2016 Laws.....	1139
II. NORTH CAROLINA’S JUDICIAL COMPOSITION .....	1141
A. <i>Constitutional Bases for the North Carolina Judiciary</i> ....	1142
B. <i>Current Workload of the Supreme Court of North         Carolina</i> .....	1143
C. <i>Legislative Changes to North Carolina’s Judicial         Elections</i> .....	1146
1. Retention Election Law.....	1147
2. Party Affiliation Laws.....	1148
3. Ballot Order Laws.....	1149
D. <i>The November 2016 North Carolina Election</i> .....	1151
1. The Results .....	1151
2. Explaining the Conflicting Outcomes.....	1153
3. Impact on the North Carolina Court-Packing Debate.....	1156
III. PREREQUISITE CONSIDERATIONS FOR STATE SUPREME COURT EXPANSION .....	1158
A. <i>Practical Necessity of Additional Justices</i> .....	1158
1. Caseload, Judicial Efficiency, and Population Growth.....	1159
2. The Practical Necessity of Additional Supreme Court of North Carolina Justices.....	1160
B. <i>Expense of Additional Justices</i> .....	1164
1. Adverse Financial Effects of Court-Packing .....	1164
2. The Cost of Additional Supreme Court of North Carolina Justices .....	1167

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2018]	<i>COURT-PACKING IN NORTH CAROLINA</i>	1127
	<i>C. Effect on the Integrity and Independence of the Judicial Branch</i> .....	1168
	1. Defining “Judicial Integrity” .....	1168
	2. The Effect of a North Carolina Court-Packing Plan on Judicial Integrity .....	1171
	CONCLUSION .....	1174

## INTRODUCTION

Dating back to President Roosevelt’s infamous 1937 proposal,<sup>1</sup> the term “court-packing” has been considered synonymous with “power-grabbing,” the general assumption being that supreme court expansion attempts are fueled by partisan motivations.<sup>2</sup> Yet, while the stigma associated with President Roosevelt’s plan initially seemed to foreclose the widespread use of court-packing, the past decade has seen an atypical resurgence in attempts to expand the number of state supreme court seats.<sup>3</sup>

The Supreme Court of North Carolina, in particular, has been the focus of court-packing rumors on several occasions.<sup>4</sup> In February 2013, an amendment to a state senate bill, Senate Bill 10, reportedly would have added two more justices to the supreme court to be appointed by Republican Governor Pat McCrory.<sup>5</sup> The amendment

1. *See infra* Section I.A.

2. *See infra* notes 54–56 and accompanying text. Throughout this Comment, I use the term “court-packing” generally, referring to any effort targeted at increasing the number of justices on any non-appealable court for *potentially* (not conclusively or exclusively) political motivations.

3. *See infra* Section I.B.

4. Although this Comment specifically focuses on the state’s highest court, the North Carolina Court of Appeals has also been subject to court-packing-related controversies in recent years. In 2000, the number of court of appeals judges was increased from twelve to fifteen by a Democrat-controlled legislature, the three vacancies being filled by then-Governor Jim Hunt the day before he left office. *See* DAVID M. BRITT & ROBERT M. HUNTER, HISTORY OF THE COURT OF APPEALS OF NORTH CAROLINA 8 (2016), [http://celebrate.nccourts.org/sites/default/files/HISTORY\\_OF\\_COA\\_3\\_Mar\\_2016.pdf](http://celebrate.nccourts.org/sites/default/files/HISTORY_OF_COA_3_Mar_2016.pdf) [<https://perma.cc/6FN3-MLSP>]. Despite the court’s steadily increasing workload prior to 2000, *id.*, Republican opponents deemed it “an attempt by Democrats to have more Democratic judges appointed to the court before Hunt left office,” noting that the court’s then chief judge “said he didn’t want the extra judges.” Colin Campbell, *Lawmakers to Return to Raleigh with Open-Ended Agenda*, NEWS & OBSERVER (Dec. 10, 2016, 10:18 AM), <http://www.newsobserver.com/news/politics-government/state-politics/article120130838.html> [<https://perma.cc/NU6W-D3CE>].

5. *See* Laura Leslie, *Senate GOP Seeks to Sweep Oversight Boards*, WRAL (Feb. 5, 2013), <http://www.wral.com/senate-gop-seeks-to-sweep-oversight-boards-/12066869/> [<https://perma.cc/3ACJ-BGUE>] (“Another provision [of Senate Bill 10] would have added two justices to the North Carolina Supreme Court, appointed by [Governor] McCrory,

was ultimately dropped from the bill in committee, but not without an accompanying promise from the chairman of the Senate Rules Committee that “the concept would be revisited later.”<sup>6</sup>

More recently, in the wake of the impending transition of gubernatorial and judicial power from one party to another, many observers wondered whether North Carolina’s Republican lawmakers would use the December 2016 special session to pass court-packing legislation before the Republican Governor was ousted.<sup>7</sup> Although the stated purpose of the session was to “address [the] important needs” of communities impacted by Hurricane Matthew,<sup>8</sup> several sources—including a former justice of the Supreme Court of North Carolina—claimed that North Carolina legislators had plans to use the Hurricane Matthew special session to add two more justices to the state’s highest court.<sup>9</sup> Some even noted that this was “not a new

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which would essentially allow the Governor to stack the court without an election.”); Bill Raftery, *Surprise Effort by NC Senate GOP to Expand Supreme Court Loses After House Balks, Likely to Return*, GAVEL TO GAVEL (Feb. 5, 2013), <http://gaveltogavel.us/2013/02/05/surprise-effort-by-nc-senate-gop-to-expand-supreme-court-loses-after-house-balks-likely-to-return/> [https://perma.cc/5M94-GFF8] (“This morning’s meeting of the North Carolina Senate Rules committee to consider SB 10 . . . turned to a different direction when Republicans put forth an effort to expand the state’s Supreme Court by 2 seats and let the newly elected Republican governor fill the new vacancies.”).

6. Leslie, *supra* note 5.

7. See Billy Corriher, *North Carolina’s Legislature Has a Devious Plan to Overturn the Will of the Voters*, THINKPROGRESS (Nov. 15, 2016, 1:48 PM), <https://thinkprogress.org/north-carolina-supreme-court-33e0873acb30#9f019yt5k> [http://perma.cc/LVR7-U9GD]; Nathan Luzum, *N.C. Republicans May Propose Court-Packing Bill to Keep Control of State Supreme Court*, CHRON. (Nov. 17, 2016), <http://www.dukechronicle.com/article/2016/11/n-c-republicans-may-propose-court-packing-bill-to-keep-control-of-n-c-supreme-court> [http://perma.cc/X3MC-DT3V]; Mark Joseph Stern, *NC Gov. Calls Special Legislative Session, Setting Up Possibility of Court-Packing Power Grab*, SLATE (Dec. 2, 2016, 5:28 PM), [http://www.slate.com/blogs/xx\\_factor/2016/12/02/mccrory\\_calls\\_for\\_special\\_legislative\\_session\\_is\\_a\\_court\\_packing\\_bill\\_coming.html](http://www.slate.com/blogs/xx_factor/2016/12/02/mccrory_calls_for_special_legislative_session_is_a_court_packing_bill_coming.html) [https://perma.cc/L8X3-Q2VE].

8. *Governor Calls Matthew Special Session*, N.C. NEWS NETWORK (Dec. 2, 2016, 1:27 PM), <http://www.ncnn.com/edit-news/9944-governor-calls-matthew-special-session> [https://perma.cc/32NU-RXPK].

9. See Melissa Boughton, *GOP Legislative Leaders Could Make Rare Court-Packing Move to Keep Partisan Control of State Supreme Court*, NC POL’Y WATCH (Nov. 11, 2016), <http://www.ncpolicywatch.com/2016/11/11/gop-legislative-leaders-make-rare-court-packing-move-keep-partisan-control-state-supreme-court/> [https://perma.cc/KR4R-X3FS] (“Former Justice Bob Orr and Common Cause North Carolina Executive Director Bob Phillips both said Thursday that they’ve heard rumors about plans to expand the court.”); Richard Craver & Bertrand Gutierrez, *State GOP Leaders Could Neutralize Democrats’ Supreme Court Majority by Adding Justices*, WINSTON-SALEM J. (Nov. 11, 2016), [http://www.journalnow.com/news/elections/state/state-gop-leaders-could-neutralize-democrats-supreme-court-majority-by/article\\_510c2c00-f7ea-5c8d-9251-26a784d6cb9c.html](http://www.journalnow.com/news/elections/state/state-gop-leaders-could-neutralize-democrats-supreme-court-majority-by/article_510c2c00-f7ea-5c8d-9251-26a784d6cb9c.html) [https://perma.cc/TVF3-2TU3] (referencing a state legislator and lawyer as their confidential sources for North Carolina court-packing rumors).

idea.”<sup>10</sup> And given the North Carolina General Assembly’s prior track record of using special sessions to pass controversial legislation,<sup>11</sup> these concerns were not without merit.

Aside from the predictably negative reactions from North Carolina Democrats, the 2016 court-packing rumors were also met with hostility from several non-partisan organizations. Days after the 2016 election, the Public Trust and Confidence Committee (“PTCC”), a subset of the North Carolina Commission on the Administration of Law & Justice (“NCCALJ”) established by Supreme Court of North Carolina Chief Justice Mark Martin,<sup>12</sup> met to discuss “the need to put the focus back on judicial independence.”<sup>13</sup> At this meeting, the PTCC passed a motion requesting that the full commission issue a statement “opposing the expansion of our Supreme Court unless the [North Carolina Administrative Office of the Courts] requests additional justices to meet workload demands.”<sup>14</sup> Another motion urged “the General Assembly to tie the number of judges and justices on a given court to the workload of the relevant court” because “any other consideration for numbers of judges and justices threatens public trust and confidence.”<sup>15</sup> Similarly, another non-partisan organization, the North Carolina Advocates for Justice (“NCAJ”),<sup>16</sup> issued a statement opposing the expansion of the Supreme Court of North Carolina in December 2016.<sup>17</sup> Analogous to the PTCC’s sentiments, the NCAJ focused on the lack of any

10. Boughton, *supra* note 9.

11. In another 2016 special session, for instance, North Carolina legislators passed a controversial transgender bathroom bill, commonly referred to as H.B. 2, “before most voters even knew what was happening.” Stern, *supra* note 7.

12. N.C. COMM’N ON THE ADMIN. OF LAW & JUSTICE, FINAL REPORT: RECOMMENDATIONS FOR STRENGTHENING THE UNIFIED COURT SYSTEM OF NORTH CAROLINA vii (2017), [http://wwwcache.wral.com/asset/news/state/nccapitol/2017/03/15/16586686/uid14896180933836/nccalj\\_final\\_report.pdf](http://wwwcache.wral.com/asset/news/state/nccapitol/2017/03/15/16586686/uid14896180933836/nccalj_final_report.pdf) [https://perma.cc/6QHE-ND3H]. The NCCALJ is a “sixty-five member, multidisciplinary commission” convened by Justice Martin in order to “undertake a comprehensive and independent review of North Carolina’s court system and make recommendations for improving the administration of justice in North Carolina.” *Id.*

13. PUB. TR. & CONFIDENCE COMM., N.C. COMM’N ON THE ADMIN. OF LAW & JUSTICE, MEETING MINUTES 1, Nov. 15, 2016, <http://nccalj.org/wp-content/uploads/2016/11/20161115-PTCC-Meeting-Minutes.pdf> [https://perma.cc/T83H-N77F].

14. *Id.*

15. *Id.*

16. NCAJ is a self-described “nonpartisan association of legal professionals dedicated to protecting people’s rights.” N.C. ADVOCS. FOR JUST., <https://www.ncaj.com/> [https://perma.cc/S45U-243W].

17. See Letter from N.C. Advocates for Justice to the N.C. Senators 1 (Dec. 9, 2016) (on file with the North Carolina Law Review).

workload-based justification for enlargement of the supreme court.<sup>18</sup> In a letter addressed to North Carolina senators, the NCAJ noted,

[N]o General Assembly, under either party, has expanded the Supreme Court in the last five decades despite having the constitutional authority to do so—because it was not justified. To do so now in a special session dedicated to disaster relief would be a mistake. Such a significant change deserves the regular process of open deliberation in regular legislative session.<sup>19</sup>

Of course, none of these court-packing predictions ever materialized, and the number of Supreme Court of North Carolina justices has remained unchanged for several decades.<sup>20</sup> However, given the enduring rumors of North Carolina court-packing, the North Carolina General Assembly's recent modifications to the state judicial election processes,<sup>21</sup> the unexpected results of North Carolina's 2016 gubernatorial and judicial elections,<sup>22</sup> and the successful passage of court-packing legislation in Georgia and Arizona in 2016,<sup>23</sup> North Carolina's court-packing debate is far from resolved.

This Comment therefore undertakes an analysis of the modern court-packing debate, specifically focusing on the prospect of a North Carolina court-packing plan. Analysis proceeds in three parts. Part I provides a general history of court-packing legislation in the United States, starting with President Roosevelt's 1937 plan. It then briefly overviews the state-level court packing plans that have been proposed over the past decade, with an emphasis on the 2016 laws passed by Arizona and Georgia. Part II discusses the relevant constitutional bases for the North Carolina judiciary, as well as its current landscape. Specifically, this Part examines the current workload of the state supreme court, the General Assembly's recent modifications to the state's judicial election processes, and the divergent results of North Carolina's 2016 judicial elections.

Finally, Part III proposes three prerequisite factors that should be considered before expanding state supreme courts: (1) the practical necessity of additional justices, determined by looking at the state's population as well as the court's efficiency and workload; (2)

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18. *Id.* at 2.

19. *Id.*

20. *See infra* notes 92–93 and accompanying text.

21. *See infra* Section II.C.

22. *See infra* Section II.D.

23. *See infra* Section I.B.2.

the cost of expanding the court; and (3) the effect of court-packing on the integrity and independence of the judicial branch. When applying these factors to the prospect of a North Carolina court-packing plan, this Comment asserts that it is clear that any benefit from a court-packing plan is outweighed by the resulting financial detriment, further-diminished caseload, destruction of public confidence in the courts, and erosion of judicial power

## I. COURT-PACKING LEGISLATION IN THE UNITED STATES

### A. *President Roosevelt's 1937 Court-Packing Plan*

Even though Article III of the United States Constitution is silent on the question of how many justices should serve on the United States Supreme Court, the Court's nine-person composition has not changed since the passage of the Judiciary Act of 1869.<sup>24</sup> In 1937, however, President Franklin Roosevelt boldly challenged this now-entrenched standard with the Judicial Procedures Reform Bill—better known as his “court-packing plan.”<sup>25</sup>

The origins of President Roosevelt's plan date back to before he took office, when the Democratic leader privately and publicly expressed concerns over the Republican-controlled Supreme Court.<sup>26</sup> The controversy between the thirty-second President and the Court, however, did not come to a head until several years after he was elected.<sup>27</sup> The President's “New Deal” legislation was the center of this dispute; with many Americans still feeling the effects of the Great

24. See JOHN V. ORTH, HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? 2 (2006).

25. The term “court-packing” was created based on the perception that President Roosevelt was attempting to “pack” the conservative court with liberal justices in order to keep his New Deal legislation intact. See *infra* notes 44–47 and accompanying text. The definition of court-packing, however, is hardly uniform. Some scholars have adopted a much broader definition, finding that court-packing occurs “every time a President nominates a person to the Bench and the nomination is confirmed by the Senate.” J.R. Saylor, “Court Packing” Prior to FDR, 20 BAYLOR L. REV. 147, 147 (1968). Others, in contrast, have limited the term's scope to refer to a change in the size of a court that leads to the appointment of additional justices. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 46 (1980).

26. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 83 (1995) (“Even before Roosevelt took office, he had aroused speculation over whether his presidency would result in a confrontation with the Court.”).

27. In his first two years in office, the President “eyed the Court warily” and “put off tests of the constitutionality of the legislation of the First Hundred Days as long as possible.” *Id.* at 84. As a result, he was able to momentarily “dispel the conviction that a collision between [himself] and the judiciary was inevitable and that steps must be taken to revamp the Supreme Court, ideas that emerged remarkably early.” *Id.*

Depression, President Roosevelt, alongside a Democratic-controlled Congress, almost immediately began introducing legislation designed to hasten “Relief, Recovery, and Reform.”<sup>28</sup> But it was not until January 1935 that the Court first reviewed and, in an 8-1 decision, ultimately struck down one piece of Roosevelt’s New Deal legislation.<sup>29</sup>

From there, Roosevelt’s contentious relationship with the Supreme Court only further deteriorated. In May 1935, the Court issued three unanimous opinions striking down another two pieces of New Deal legislation<sup>30</sup> and also limited the President’s removal powers over members of independent regulatory agencies.<sup>31</sup> Again, the Court echoed the same concerns about Congress delegating to the President “unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.”<sup>32</sup> In June 1936, in what appeared to be “the last straw” for New Deal proponents,<sup>33</sup> the Court in *Morehead v. New York ex rel. Tipaldo*<sup>34</sup> struck down New York’s minimum-wage law

28. Mary Kate Blaine, *The New Deal: Legislation & Policies*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/content/new-deal-legislation-policies> [https://perma.cc/RBF9-WABD].

29. See *Pan. Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). The Court reasoned that portions of the National Industrial Recovery Act (“NIRA”) unconstitutionally delegated legislative power to the President and expressly noted, “The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute.” *Id.* at 420.

30. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935) (finding the Frazier-Lemke Act void on the ground that it violated the takings clause of the Fifth Amendment); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (striking down the remainder of the NIRA as “an unconstitutional delegation of legislative power”).

31. *Humphrey’s Executor v. United States*, 295 U.S. 602, 628–29 (1935).

32. *Schechter Poultry*, 295 U.S. at 537–38; see also *Humphrey’s Executor*, 295 U.S. at 629–30 (“The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed and is hardly open to serious question. . . . The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission.”).

33. LEUCHTENBURG, *supra* note 26, at 105. The five-member majority’s stubborn approach resulted in “national outcry against the Court,” *id.*, and has since been deemed “[p]erhaps the most unpopular decision of the 1935–1936 Supreme Court term,” John W. Johnson, *Morehead v. New York ex rel. Tipaldo*, in *THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS* 234, 234 (Kermit L. Hall & James W. Ely, Jr. eds., 2d ed. 2009).

34. 298 U.S. 587 (1936).



for women as an improper use of state power,<sup>35</sup> despite its recent indication that the fixing of wages and hours was a state matter.<sup>36</sup>

Throughout this period, Roosevelt generally minimized his public condemnations of the Court. In private, however, he was meeting with a group of lawyers and advisors to craft a solution to his stalled agenda.<sup>37</sup> Several alternatives to increasing the size of the Court were discussed but ultimately rejected in favor of the Judicial Procedures Reform Bill.<sup>38</sup> Under the bill, when an existing federal judge—including Supreme Court justices—with at least ten years of service remained on the bench for more than six months after reaching the age of seventy, the President would be allowed to appoint an additional judge to that court.<sup>39</sup> And, because the Supreme Court was, at the time, the most elderly court to date, this proposal would have allowed Roosevelt to “appoint six new Justices to the Supreme Court (and 44 judges to lower federal courts) thus instantly tipping the political balance on the Court dramatically in his favor.”<sup>40</sup>

But despite his true anti-obstructionist motivations, the President framed the bill as a way to remedy the “lowered mental or physical vigor” of aging federal judges.<sup>41</sup> President Roosevelt claimed that life tenure of judges was “not intended to create a static judiciary” and that “[a] constant and systematic addition of younger blood [would] vitalize the courts and better equip them to recognize and apply the essential concepts of justice in light of the needs and the facts of an ever-changing world.”<sup>42</sup> The President and his advisors hoped that “[b]y emphasizing the need for greater efficiency . . . the plan would be accepted as a project for judicial reform rather than being viewed simply as a stratagem to pack the Court.”<sup>43</sup>

35. *Id.* at 618.

36. Compare *Schechter Poultry*, 295 U.S. at 550 (“[T]he attempt . . . to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power.”), with *Morehead*, 298 U.S. at 611 (“[T]he State is without power by any form of legislation to prohibit, change, or nullify contracts between employers and adult women workers as to the amount of wages to be paid.”).

37. See William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN (May 2005), <https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/> [https://perma.cc/4LBS-E2LH].

38. See Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1, 2–4 (2013) (detailing the President’s consideration and rejection of alternative solutions).

39. See S. 1392, 75th Cong. § 1(a)–(b) (1937); H.R. 4417, 75th Cong. § 1(a)–(b) (1937).

40. See Leuchtenburg, *supra* note 37.

41. President Presents a Plan for Reorganization of the Judicial Branch of the Government, 1937 PUB. PAPERS 51, 55 (Feb. 5, 1937).

42. *Id.*

43. LEUCHTENBURG, *supra* note 26, at 125.

Roosevelt's attempt at hiding his true motivation, however, was unsuccessful. The plan, introduced to Congress in February 1937, was immediately criticized as a partisan attempt to prevent the Court from stonewalling his New Deal legislation by appointing more liberal justices.<sup>44</sup> Throughout the entire country, the bill "generated an intensity of response unmatched by any legislative controversy of this century."<sup>45</sup> Unsurprisingly, public opinion on the court-packing plan was strongly divided based on party affiliation. According to a March 1937 Gallup Poll, seventy percent of Democrats favored Roosevelt's proposal, compared to a mere eight percent of Republicans.<sup>46</sup> Media coverage was largely influential, as "discussions of the plan from every conceivable angle" dominated newspaper headlines across the country.<sup>47</sup>

Ultimately, Roosevelt's court-packing plan failed to pass.<sup>48</sup> Yet, despite the President's underlying partisan objectives, this failure is almost entirely attributed to external factors rather than his subjective motivations. Less than two months after the bill was introduced, historically anti-New Deal Justice Owen Roberts voted to uphold a Washington minimum wage law<sup>49</sup>—an ideological shift known as "the switch in time that saved nine."<sup>50</sup> Shortly after, in May 1937,

44. See *id.* at 138; *FDR's "Court-Packing" Plan*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/fdrs-court-packing-plan> [https://perma.cc/JAF2-Y58P] ("Roosevelt's motive was clear—to shape the ideological balance of the Court so that it would cease striking down his New Deal legislation. As a result, the plan was widely and vehemently criticized.").

45. LEUCHTENBURG, *supra* note 26, at 134.

46. Lydia Saad, *Gallup Vault: A Supreme Court Power Play*, GALLUP (Feb. 26, 2016), <http://www.gallup.com/vault/189617/supreme-court-power-play.aspx> [https://perma.cc/V2VM-VEMW]. This partisan divide continued "for the next several months until the plan became moot." *Id.*

47. Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1141 (1987).

48. *How FDR Lost His Brief War on the Supreme Court*, NAT'L CONST. CTR. (Feb. 5, 2013), <https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court> [https://perma.cc/LW9W-6XG6] ("FDR's war on the court was short-lived, and it was defeated by a craft chief justice and Roosevelt's own party members.").

49. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

50. Just nine months prior, Justice Roberts had joined the *Morehead* majority in striking down the New York minimum wage law. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936). "The reversal was blunt and unembarrassed—and a shock." BURT SOLOMON, *FDR v. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* 158 (2009). But the motivations behind Justice Roberts' change-of-heart remain the subject of debate. See Brian T. Goldman, *The Switch in Time That Saved Nine: A Study of Justice Owen Roberts's Vote in West Coast Hotel Co. v. Parrish*, C. UNDERGRADUATE RES. ELECTRONIC J. 110–13 (2012), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1181&context=curej> [https://perma.cc/CK3K-NVK4] (concluding that "Justice Roberts's votes in *Morehead* and *Parrish* derived

conservative Justice Willis Van Devanter announced his impending retirement, which, combined with several close 5-4 decisions, “decreased support for Roosevelt’s proposal by nearly” ten percent.<sup>51</sup> The following month, the Senate Judiciary Committee released a scathing report denouncing the bill as a “needless, futile and utterly dangerous abandonment of constitutional principle” that violated “every sacred tradition of American democracy.”<sup>52</sup> Eventually, in July 1937, the President was forced to accept defeat, as the Senate returned his court-packing bill to committee, where it would remain indefinitely.<sup>53</sup>

In light of the “vigorous opposition” to President Roosevelt’s 1937 court-packing plan,<sup>54</sup> it is unsurprising that there have been no attempts to pick up where President Roosevelt left off.<sup>55</sup> As explained by one scholar, “the possibility of change in the frequency of appointments has become inextricably associated with partisan threats to the independence of the Court” due to Roosevelt’s (and others’) politically motivated court-packing attempts.<sup>56</sup> Accordingly,

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from a desire to run for president in 1936”); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 102–03 (2010) (providing quantitative evidence “rebutting naive accounts that Roberts’s vote in *Parrish* was a direct result of the court-packing plan”).

51. Caldeira, *supra* note 47, at 1148–49.

52. MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 485 (2002).

53. See LEUCHTENBURG, *supra* note 26, at 153.

54. *Id.* at 137.

55. In 2013, some conservatives characterized President Barack Obama’s attempts to fill existing federal court vacancies as “court-packing.” See Barnini Chakraborty, *Conservatives Accuse Obama of Packing Key Court to ‘Rubber Stamp’ Agenda*, FOX NEWS (Aug. 24, 2013), <http://www.foxnews.com/politics/2013/08/24/republicans-accuse-obama-court-packing.html> [https://perma.cc/3KXB-NE6K]; Alfred S. Regnery, *Obama’s Court Packing Plan*, BREITBART (June 12, 2013), <http://www.breitbart.com/big-government/2013/06/12/obamas-court-packing-plan/> [https://perma.cc/2APG-8WTT]; Ammon Simon, *Republican AGs vs. Obama’s Court-Packing Plan*, NAT’L REV. (Oct. 28, 2013), <http://www.nationalreview.com/bench-memos/362398/republican-ags-vs-obamas-court-packing-plan-ammon-simon> [https://perma.cc/X8WC-QG6J]. However, filling existing federal court vacancies does not comport with this Comment’s definition of “court-packing.” See *supra* note 2.

56. John M. Lawlor, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 969 (1986); see also Laura A. Cisneros, *Transformative Properties of FDR’s Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. L. 61, 79 (2012) (“[T]he ‘Court-Packing Plan’ phrase tends to be used to identify unauthorized or unwanted attacks on the judiciary.”); Michael O’Donnell, *A Wedge Against Tyranny: Franklin Roosevelt v. the Supreme Court*, NATION (July 28, 2010), <https://www.thenation.com/article/wedge-against-tyranny/> [https://perma.cc/75RX-E2P2] (“[Court-packing plans] dangerously concentrate power in one branch and undermine the authority of the Supreme Court, leaving it weak at those moments when we sorely need it.”).

the legacy of the 1937 plan appears to have “reinforced a natural tendency to avoid changes in the Court’s traditional size and system of appointments.”<sup>57</sup> Although the logic of the current nine-member Supreme Court structure has not gone completely unquestioned,<sup>58</sup> it remains unlikely that this number will be modified anytime soon, given the longevity of this now-entrenched structure.

### B. *The Recent Resurgence of State Court-Packing*

Proposals to enlarge the number of *state* supreme court seats, in contrast, have been a far more common occurrence in recent years. According to William Raftery, a National Center for State Courts analyst who has kept record of recent efforts to modify the number of state supreme court justices, there has been a “dramatic uptick” in states attempting to pass, and, in two recent instances, successfully enacting, “overtly political” court-packing legislation over the past decade.<sup>59</sup>

#### 1. Unsuccessful Attempts

As documented by Raftery, the vast majority of state court-packing attempts over the past decade have been unsuccessful.<sup>60</sup> In 2007, a then Florida state senator introduced a bill that would have more than doubled the number of Florida Supreme Court justices from seven to fifteen.<sup>61</sup> This bill was irrefutably motivated by an

57. Lawlor, *supra* note 56, at 975.

58. See, e.g., *id.* at 996–1000 (proposing a self-proclaimed “court-packing plan” that would modify the timing of Supreme Court appointments); Jonathan Turley, *Unpacking the Court: The Case for the Expansion of the United States Supreme Court in the Twenty-First Century*, 33 PERSPECTIVES POL. SCI. 155, 155 (2010) (arguing in favor of a nineteen-member Supreme Court).

59. William E. Raftery, *Up, Down, All Around: Legislative Proposals to Change State Supreme Court Compositions Gaining Popularity*, JUDICATURE, Autumn 2016, at 6, 6–7; Russell Berman, *Arizona Republicans Try to Bring Back Court-Packing*, ATLANTIC (May 10, 2016), <https://www.theatlantic.com/politics/archive/2016/05/court-packing-enjoys-a-political-renaissance/481758/> [<https://perma.cc/KP9K-NYUG>]. According to Raftery, in the 1980s and 1990s, there were five successful state-level modifications to the number of sitting justices in Iowa, Minnesota, Connecticut, Oklahoma, and Nevada. See Raftery, *supra*, at 6–7. Referring to these efforts as “court-packing” laws, however, is tenuous considering the lack of any evidence indicating that these changes were politically motivated. See *id.*

60. See Bill Raftery, *Over a Dozen Efforts to Alter Number of State Supreme Court Justices, Almost All Related to “Packing” the Courts, in Last Several Years*, GAVEL TO GAVEL (Feb. 5, 2013), <http://gaveltogavel.us/2013/02/05/over-a-dozen-efforts-to-alter-number-of-state-supreme-court-justices-almost-all-related-to-packing-the-courts-in-last-several-years/> [<https://perma.cc/75YZ-8P8F>].

61. S.J. Res. 408, 2007 Leg., Reg. Sess. (Fla. 2007).

unfavorable Florida Supreme Court decision, given that the first page of the bill explicitly stated,

[T]he Legislature of the State of Florida finds that the majority decision by the Florida Supreme Court . . . was specious in its posture regarding the doctrine of judicial restraint and was the equivalent of judicial activism in policymaking, and . . . the decision betrays a lack of respect on the part of the majority for the separation of state powers.<sup>62</sup>

Similarly, in 2010, Iowa Republicans introduced House Joint Resolution 2012, which sought to triple the number of Iowa Supreme Court judges.<sup>63</sup> Although the legislature's political motivations were not stated plainly in the bill's text, House Joint Resolution 2012 was proposed less than one year after the Iowa Supreme Court unanimously struck down the state's same-sex marriage law<sup>64</sup>—a decision that was highly criticized by Republicans as an attempt to legislate from the bench.<sup>65</sup>

South Carolina lawmakers have also contributed to the recent spike in court-packing attempts. In the 2013-2014 session, a Republican legislator introduced a constitutional amendment that would have expanded the state supreme court from five to seven judges.<sup>66</sup> Because the South Carolina Constitution requires that the

62. *Id.* When Florida Senate Joint Resolution 408 became public, it was quickly withdrawn, with the bill's sponsor claiming that it was only drafted in the first place because "a law student came up with the idea." *A Busy Week*, FLA. POL. (Jan. 8, 2007), <http://flapolitics.blogspot.com/2007/01/busy-week.html> [<https://perma.cc/9MC2-SGEJ>].

63. H.J. Res. 2012, 83d Gen. Assemb., Reg. Sess. (Iowa 2010) (proposing to increase the supreme court from three to nine justices).

64. *See Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) ("We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification.").

65. *See* Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN (Nov. 3, 2010, 1:13 PM), <http://www.cnn.com/2010/POLITICS/11/03/iowa-judges/> [<https://perma.cc/26GF-CDE7>].

66. H.J. Res. 3090, 2013 Gen. Assemb., 120th Sess. (S.C. 2013). Although this marked the first time that a Republican had brought this issue before the legislature, the same Democratic senator had introduced this exact bill in nearly "every legislative session in South Carolina for almost two decades." Bill Raftery, *For 2 Decades SC Senate Dem Tried to Expand Supreme Court From 5 to 7, Now it is a House Republican Trying to do the Same in 2013*, GAVEL TO GAVEL (Jan. 2, 2013), <http://gaveltogavel.us/2013/01/02/for-2-decades-sc-senate-dem-tried-to-expand-supreme-court-from-5-to-7-now-it-is-a-house-republican-trying-to-do-the-same-in-2013/> [<https://perma.cc/Y3WE-SGR3>].

state supreme court judges be elected by the General Assembly,<sup>67</sup> some observers have classified the proposal as “self-interested.”<sup>68</sup>

Conversely, other states have (unsuccessfully) attempted to pass court “un-packing” plans that seek to *decrease* the number of state supreme court judges for political gain.<sup>69</sup> In 2011, for example, Montana’s House Bill 245 proposed to reduce the number of Montana Supreme Court judges from seven to five.<sup>70</sup> Again, legislators were transparent regarding their intentions, as House Bill 245’s Republican author candidly argued that reducing the number of justices would lead to a higher caseload, thereby allowing the supreme court to become the legislature’s “ally in tort reform.”<sup>71</sup> Similarly, in 2013, Republican senators in Washington state sought to reduce the number of state supreme court justices from nine to five.<sup>72</sup> By directly citing to the court’s controversial decisions, legislators made clear that their intent was to “punish the Court for performing its requisite check upon political power.”<sup>73</sup> One critic observed,

To the justices in Olympia, Washington the message of the “court unpacking plan” is clear: if you render decisions which are unpopular, or which are at least unpopular along a particular portion of the political spectrum, you may lose your job and, worse, the cherished institution for which you work may lose its freedom to issue rulings without fear or favor, even when those rulings deprive powerful political forces of the victories they seek.<sup>74</sup>

67. See S.C. CONST., art. V, § 3.

68. John L. Warren III, *Holding the Bench Accountable: Judges Qua Representatives*, 6 WASH. U. JURIS. REV. 299, 324 (2014).

69. See, e.g., Andrew Cohen, *A “Court Unpacking Plan” Threatens Judicial Independence*, BRENNAN CTR. FOR JUST. (Mar. 8, 2013), <https://www.brennancenter.org/analysis/%E2%80%9Ccourt-unpacking-plan%E2%80%9D-threatens-judicial-independence> [<https://perma.cc/3EJS-L623>].

70. H.R. 245, 62nd Leg., Reg. Sess. (Mont. 2011).

71. *Provide for Reduction in Size of Supreme Court: Hearing on H.B. 245 Before the H. Comm. on Judiciary*, 62d Leg., Reg. Sess. at 6:55 (Mont. 2011) (Statement of Rep. Derek Skees, House District 4), [http://montanalegislature.granicus.com/MediaPlayer.php?view\\_id=21&clip\\_id=5406](http://montanalegislature.granicus.com/MediaPlayer.php?view_id=21&clip_id=5406) [<https://perma.cc/69TJ-MNXP>]. Ultimately, even though Republican legislators agreed with the “broader point about the legislative branch being unnecessarily weak, particularly when it comes to state agencies under the executive branch,” the bill never made it out of committee. Dan Testa, *Skees’ Court-Shrinking Bill Doesn’t Get Far*, FLATHEAD BEACON (Jan. 25, 2011), <http://flatheadbeacon.com/2011/01/25/skees-court-shrinking-bill-doesnt-get-far/> [<https://perma.cc/Q4H4-F3R6>].

72. S.B. 5867, 63rd Leg., 2013 Reg. Sess. (Wash. 2013).

73. Cohen, *supra* note 69.

74. *Id.*

In sum, although none of these bills were ever signed into law, the increasing number of state-level proposals nonetheless signals an important change in attitudes towards court-packing generally. Like Roosevelt's plan, the majority of these proposals were fueled by transparent political motivations. Yet, the same widespread, hostile public reaction that greeted the 1937 proposal now seems to be lacking. These failed attempts also indicate that legislators are far less hesitant to support and defend these purportedly controversial bills than previously believed, which may signal an even broader shift in general attitudes towards the usurpation of judicial power.

## 2. Georgia and Arizona's 2016 Laws

Eventually, after nearly a decade of unsuccessful state court-packing proposals, two 2016 state court-packing laws were passed within days of each other, both of which increased their respective state supreme courts by two justices. On May 3, 2016, Georgia Governor Nathan Deal signed House Bill 927 into law, thereby expanding the Supreme Court of Georgia from seven justices to nine.<sup>75</sup> Fifteen days later, Arizona followed suit, increasing the number of Arizona Supreme Court seats from five to seven upon the signing of House Bill 2537.<sup>76</sup>

Although these two laws were structured differently,<sup>77</sup> both were Republican-fueled efforts primarily supported by a similar justification: judicial efficiency. Proponents of Georgia's law claimed that the state's projected population increase necessitated an expanded court system in order to "keep pace with the demands of a fast-growing state."<sup>78</sup> Similarly, Arizona Governor Doug Ducey asserted that House Bill 2537 "puts Arizona on par with states that

75. Appellate Jurisdiction Reform Act of 2016, No. 626, sec. 4-1, § 15-2-1.1, 2016 Ga. Laws 883, 890 (codified at GA. CODE ANN. § 15-2-1.1 (West, Westlaw through Act 284 of the 2018 Leg. Sess.)); Greg Bluestein, *Georgia Governor's Influence on State's Judiciary Set to Expand*, ATLANTA J-CONST. (May 3, 2016, 12:00 AM), <http://www.myajc.com/news/state-regional-govt-politics/georgia-governor-influence-state-judiciary-set-expand/iAG6PGXGhF9GohtiBAMcvK/> [<https://perma.cc/K84Z-TY5A>].

76. Act Amending Section 12-101, Arizona Revised Statutes; Relating to the Supreme Court, ch. 333, sec. 1, § 12-101, 2016 Ariz. Sess. Laws 2552, 2552 (codified at ARIZ. REV. STAT. ANN. § 12-101 (West, Westlaw through Mar. 2018 of Second Reg. Sess.)); *see also* Letter from Douglas A. Ducey, Governor of Ariz., to Michele Reagan, Sec'y of State of Ariz. 1-2 (May 18, 2016), [http://azgovernor.gov/sites/default/files/hb\\_2537\\_signing\\_letter.pdf](http://azgovernor.gov/sites/default/files/hb_2537_signing_letter.pdf) [<https://perma.cc/5NRJ-4X4F>].

77. While Georgia's increase "was part of a larger bill that restructured the jurisdiction, practice, and procedures" of the entire judiciary, Arizona's was limited to adding more supreme court justices. Raftery, *supra* note 59, at 7.

78. Bluestein, *supra* note 75.

have similar or smaller resident populations, yet more Supreme Court justices,” noting that “more voices will ensure that the court can increase efficiency, hear more cases, and issue more opinions.”<sup>79</sup>

Despite these comparable rationales, Georgia’s law received more support than Arizona’s, both from the courts and Democratic legislators. On one end, Georgia’s chief justice was “delighted” by the prospect of having “more eyes and ears and minds that look at an issue.”<sup>80</sup> In contrast, Chief Justice Scott Bales from Arizona urged the Governor to veto the bill because “[a]dditional justices are not required by the Court’s caseload, and an expansion of the Court . . . is not warranted when other court-related needs are underfunded.”<sup>81</sup> Moreover, while Arizona’s law passed by a narrow 51-38 margin,<sup>82</sup> Georgia’s law was adopted by a bipartisan vote of 156-63.<sup>83</sup>

Opponents of both laws, however, were outspoken. Georgia’s Senate Minority Leader Steve Henson claimed the law was a “power grab” by the Governor and that it reflected “a national trend [towards] making the judiciary more of a political playground.”<sup>84</sup> And given that a majority of the supreme court’s sitting justices “were appointed by a Democrat,”<sup>85</sup> Senator Henson’s claim that the Georgia legislature was “trying to pack the court . . . for political reasons”<sup>86</sup>

79. Letter from Douglas A. Doucey to Michele Reagan, *supra* note 76.

80. Bluestein, *supra* note 75.

81. Letter from Scott Bales, Chief Justice, Ariz. Supreme Court, to Douglas Ducey, Governor of Ariz. (May 5, 2016), <https://drive.google.com/viewerng/viewer?url=http://archive.azcentral.com/persistent/icimages/politics/ScottBalesvetoletter05052016.pdf> [https://perma.cc/45GD-T2J3].

82. See *Voting Record for AZ HB2537*, LEGISCAN, <https://legiscan.com/AZ/votes/HB2537/2016> [https://perma.cc/C6PF-JAQQ]. Notably, this vote nearly mimics the partisan divide within the Arizona legislature: as of 2016, there were thirty-eight Democratic legislators and fifty-two Republican legislators. See NAT’L CONFERENCE OF STATE LEGISLATORS, STATE & LEGISLATIVE PARTISAN COMPOSITION (2016 ELECTION) (2016), [http://www.ncsl.org/Portals/1/Documents/Elections/Legis\\_Control\\_2016\\_Post12\\_15\\_11am.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2016_Post12_15_11am.pdf) [https://perma.cc/MJ46-M89Y].

83. See *2015-2016 Regular Session - HB 927*, GA. GEN. ASSEMBLY, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/927> [https://perma.cc/CZY3-5TYA]. And, since Georgia had eighty Democratic legislators at the time, see NAT’L CONFERENCE OF STATE LEGISLATORS, *supra* note 82, House Bill 927 necessarily received bipartisan support.

84. Bluestein, *supra* note 75.

85. Ian Millhiser, *Governor Wants to Pack Georgia Supreme Court and Give Republicans a Majority*, THINKPROGRESS (Oct. 6, 2015, 4:42 PM), <https://thinkprogress.org/governor-wants-to-pack-georgia-supreme-court-and-give-republicans-a-majority-41df9abaf1ae/> [http://perma.cc/AQS4-NLM].

86. Kristina Torres, *Expansion of Georgia’s Supreme Court Wins Final Approval*, ATLANTA J-CONST. (Mar. 22, 2016, 10:16 PM), <http://www.ajc.com/news/state--regional-govt--politics/expansion-georgia-supreme-court-wins-final-approval/skmjVHCCo80HW4hXZKL6rM/> [http://perma.cc/5PR8-LAN2].



was not completely unfounded. In Arizona, a Democratic state senator similarly stated that the “only reason” for the law was to enable the Governor to “stack the Supreme Court with his picks.”<sup>87</sup> Other House Bill 2537 adversaries went even further, calling on the legislature to “resist the temptation to pack the Arizona Supreme Court” and noting its “corrosive potential” on the independence of the judiciary and the system of checks and balances.<sup>88</sup> These critics also admonished its projected financial burden—nearly \$1 million—on Arizona taxpayers.<sup>89</sup>

Yet, even in light of these criticisms, both Arizona and Georgia achieved what Florida, Iowa, South Carolina, Montana, Washington, and other state court-packing proponents could not. While the practical effects of these two laws are yet to be seen, they nonetheless provide guidance for future state court-packing plans—especially in similarly situated states like North Carolina.<sup>90</sup>

## II. NORTH CAROLINA’S JUDICIAL COMPOSITION

North Carolina is unique in the context of the court-packing debate in that, although court-packing legislation has not been enacted, rumors of state supreme court expansion have provided for a fairly extensive discussion of the necessity and desirability of such a law. Moreover, the significant changes to the North Carolina judicial election processes that have occurred in recent years indicate that the North Carolina General Assembly is both willing and able to pass court-packing legislation, with or without the support of the other two branches. Accordingly, even though the likelihood of a North Carolina court-packing plan has decreased since Democratic Governor Roy Cooper was elected in November 2016,<sup>91</sup> the North Carolina court-packing threat remains imminent.

87. Yvonne Wingett Sanchez, *Gov. Doug Ducey Signs Legislation to Expand Arizona Supreme Court*, AZCENTRAL (May 18, 2016, 11:35 AM), <http://www.azcentral.com/story/news/politics/arizona/2016/05/18/gov-doug-ducey-signs-legislation-expand-arizona-supreme-court/84544008/> [http://perma.cc/S3TJ-QYEJ].

88. Editorial Board, *Our View: Arizona’s Supreme Court Expansion is About 1 Thing*, AZCENTRAL (Apr. 3, 2016, 10:20 PM), <http://www.azcentral.com/story/opinion/editorial/2016/04/04/arizona-supreme-court-expansion/82491766/> [http://perma.cc/6G8H-6LSM].

89. *Id.*

90. *See infra* Section III.A.2.

91. *See infra* Section II.D.1.

A. *Constitutional Bases for the North Carolina Judiciary*

The most fundamental court-packing question is whether there exists a constitutional basis for supreme court expansion.<sup>92</sup> For the Supreme Court of North Carolina, the answer is straightforward. Article IV, Section 6 of the North Carolina Constitution states, “[t]he Supreme Court shall consist of a Chief Justice and six Associate Justices, but the General Assembly may increase the number of Associate Justices to not more than eight.”<sup>93</sup> Thus, since the Supreme Court of North Carolina is currently comprised of seven total members,<sup>94</sup> two seats may be added without the need for a constitutional amendment.

An equally important question is whether the North Carolina Constitution specifies how newly-created Supreme Court of North Carolina seats would be filled. According to Article IV, Section 19, all judicial vacancies “shall be filled by appointment of the Governor, and the appointees shall hold their places until” the next General Assembly election held at least sixty days after the vacancy occurs.<sup>95</sup> In 2001, the Supreme Court of North Carolina clarified that the creation of new judgeships constitutes a “vacancy” within the meaning of this constitutional provision.<sup>96</sup> Thus, again, this answer is clear: although new supreme court positions would ultimately be filled via democratic election, the initial duty of appointment is vested in the North Carolina Governor.<sup>97</sup>

The size and scope of North Carolina’s judicial landscape, however, underwent substantial changes before it reached its current

92. If, for example, the state’s constitution imposes a maximum number of seven supreme court justices, but the legislature seeks to increase the number of justices to nine, then this increase must be done via constitutional amendment. In contrast, if the constitution either provides a higher maximum number or imposes no limit on the number of supreme court justices, then the legislature may expand the size of the court without going through the more onerous constitutional amendment process.

93. N.C. CONST. art. IV, § 6. Although this constitutional provision has (coincidentally) remained unchanged since 1937, this was not always the case. From 1818 to 1868, the constitution only provided for three judges, until the 1868 constitution increased the number to five. JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION WITH HISTORY AND COMMENTARY* 106 (1993). In 1876, the court was reduced for the first and only time back down to its original three members. *Id.* In the years following, the size of the Supreme Court of North Carolina was increased to five in 1888, and then again to seven in 1937. *Id.*

94. *Supreme Court of North Carolina*, N.C. CT. SYS., <http://www.nccourts.org/courts/appellate/supreme/> [<http://perma.cc/7WGU-5WJN>].

95. N.C. CONST. art. IV, § 19.

96. *Pope v. Easley*, 354 N.C. 544, 549, 556 S.E.2d 265, 268–69 (2001).

97. The caveats of the Governor’s appointment power are discussed further in Section II.D.3.

form. The North Carolina Court of Appeals originally arose as a response to the state's overworked judicial branch from 1917 to 1957—a period that has been described as “a figurative nightmare” for North Carolina courts.<sup>98</sup> In 1955, to remedy the “feebly modernized” judiciary, the North Carolina Bar Association created the Committee on Improving and Expediting the Administration of Justice in North Carolina.<sup>99</sup> Three years later, this Committee issued a report (the “Bell Report”) that raised concerns over the caseload of the Supreme Court of North Carolina, which had increased from approximately forty opinions per justice to fifty per justice in just a few years.<sup>100</sup> Since litigation was projected to increase “possibly more rapidly than population,” the Committee concluded that the establishment of an intermediate appellate court was the most effective solution.<sup>101</sup> Consequently, in 1967, the North Carolina Court of Appeals was created.<sup>102</sup>

#### *B. Current Workload of the Supreme Court of North Carolina*

Ironically, the Bell Report's solution to an overworked supreme court may have been too effective. Although the workload of the Supreme Court of North Carolina has been the subject of criticism over the past several years, these complaints have not stemmed from an unmanageably *high* number of cases passing through the courtroom doors. On the contrary, the *declining* number of opinions issued by the court each year has been the central concern of the court's critics.

98. James W. Narron & John R. Hess, *A Brief History of Judicial Reform and the District Court in North Carolina*, N.C. B. ASS'N 5 (2016), <https://www.ncbar.org/media/721091/a-brief-history-of-judicial-reform-and-the-district-court-in-north-carolina.pdf> [http://perma.cc/23XK-QCKU]. During this time, the North Carolina legislature “passed 111 acts relating to the jurisdiction of lower courts, 144 to modify lower court procedures, and 25 to abolish previously constituted courts in their entirety.” *Id.*

99. *Id.* at 5.

100. *Id.* at 9. From 1953 to 1957, the Supreme Court of North Carolina wrote 348 opinions per year, which totaled approximately fifty per justice—a substantial increase from prior years in which these judges were only issuing about forty opinions per year. *Id.*

101. *Id.* at 10.

102. JOHN V. ORTH & PAUL M. NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 131 (2d ed., 2013). Notably, while the Committee did “recommend that the General Assembly be authorized to increase the number of Associate Justices to not more than eight,” it also emphasized the importance of the supreme court not becoming “so large as to be unwieldy or subject to undue fragmentation of opinion.” N.C. BAR ASS'N, REPORT OF THE COMM. ON IMPROVING AND EXPEDITING THE ADMIN. OF JUST. IN N.C. 10 (1958) [hereinafter BELL REPORT], [http://nccalj.org/wp-content/uploads/2016/01/Report\\_Improving\\_and\\_Expediting.-12.1958.pdf](http://nccalj.org/wp-content/uploads/2016/01/Report_Improving_and_Expediting.-12.1958.pdf) [https://perma.cc/8NME-KJ9H].

In 2011, former Supreme Court of North Carolina Justice Robert Orr wrote an article addressing the “growing level of concern and confusion” over the supreme court’s diminishing workload.<sup>103</sup> In his article Orr pointed out the “numerical imbalance” between the recent yearly caseloads of the court of appeals and supreme court, noting that “as the number of cases decided by the court of appeals continues to be in the thousands, the number of cases decided by the supreme court has dramatically dropped.”<sup>104</sup> The former justice attributed this disparity in part due to “a massive resistance on the part of the [supreme] court” to review cases involving substantial constitutional questions.<sup>105</sup>

Three years later, *North Carolina Lawyers Weekly* similarly noted that the “data backs up the perception that the [Supreme Court of North Carolina’s] output has been declining.”<sup>106</sup> The analysis concluded that “the court has been issuing far too few opinions in recent years, and that needs to change,” noting how “[t]he lack of precedent from the court means less guidance for lower courts about how to interpret state laws, and more uncertainty for lawyers trying to litigate cases.”<sup>107</sup> The article, however, did hypothesize that “a reversal of the trend may be in the offing” based on the passage of several new laws and the increased attention to this issue during the campaign season.<sup>108</sup>

Coincidental or not, as of 2017, the number of signed supreme court opinions<sup>109</sup> issued per year is no longer decreasing. According to the North Carolina Courts Statistical and Operational Summaries, the

103. Robert Orr, *What Exactly is a “Substantial Constitutional Question” for Purposes of Appeal to the North Carolina Supreme Court?*, 33 CAMPBELL L. REV. 211, 238 (2010).

104. *Id.* at 217.

105. *Id.* at 222. Orr also noted that fewer dissenting court of appeals’ opinions (since the supreme court is required to review cases in which the appeals decision was not unanimous) and a drop in death penalty cases may explain the diminishing caseload of the supreme court. *Id.* at 218.

106. David Donovan, *Diminished Return: A Look at Recent State Supreme Court Cases Shows that the Court’s Output of Opinions Has Declined*, N.C. LAW. WKLY. (Sept. 22, 2014), <http://nclawyersweekly.com/2014/09/22/diminished-return-a-look-at-recent-state-supreme-court-cases-shows-that-the-courts-output-of-opinions-has-declined> [http://perma.cc/3ZSV-XW4G].

107. *Id.*

108. *Id.*

109. Per curiam opinions—“cases where the justices simply endorsed either the majority or dissenting opinion from the Court of Appeals,” *id.*—were excluded because they were not actually authored by the supreme court justices.

number of signed opinions nearly doubled in just two fiscal years.<sup>110</sup> Table 1 shows the number and type of supreme court opinions issued from July 1, 2012 to June 30, 2017.

<b>Supreme Court of North Carolina Opinions<sup>111</sup></b>		
<b>Date</b>	<b>Signed Opinions</b>	<b>Average per Judge</b>
07/01/2012–06/30/2013	31	4–5
07/01/2013–06/30/2014	21	3
07/01/2014–06/30/2015	29	4–5
07/01/2015–06/30/2016	40	5–6
07/01/2016–06/30/2017	40	5–6

**Table 1**

However, the trajectory of this trend remains uncertain, especially in light of the newly adopted en banc procedure for the North Carolina Court of Appeals, which is likely to further diminish

110. As specified in Table 1, these summaries measure the number of opinions by fiscal year, not calendar year, meaning they start on July 1 and end on June 30 the following year.

111. N.C. ADMIN. OFF. OF THE CTS., STAT. AND OPERATIONAL REPORT FOR APP. CTS.: 2016–17, at 7 [http://www.nccourts.org/Citizens/SRPlanning/Documents/2016-17\\_appellate\\_courts\\_statistical\\_and\\_operational\\_report.pdf](http://www.nccourts.org/Citizens/SRPlanning/Documents/2016-17_appellate_courts_statistical_and_operational_report.pdf) [<https://perma.cc/D53F-U853> (staff-uploaded archive)]; N.C. ADMIN. OFF. OF THE CTS., STAT. AND OPERATIONAL REPORT FOR APP. CTS.: 2015–16, at 7, [http://www.nccourts.org/Citizens/SRPlanning/Documents/2015-16\\_appellate\\_courts\\_statistical\\_and\\_operational\\_report.pdf](http://www.nccourts.org/Citizens/SRPlanning/Documents/2015-16_appellate_courts_statistical_and_operational_report.pdf) [<http://perma.cc/8PXF-THC5>]; N.C. ADMIN. OFF. OF THE CTS., STAT. AND OPERATIONAL REPORT FOR APP. CTS.: 2014–15, at 7–8, [http://www.nccourts.org/Citizens/SRPlanning/Documents/2014-15\\_appellate\\_courts\\_statistical\\_and\\_operational\\_report.pdf](http://www.nccourts.org/Citizens/SRPlanning/Documents/2014-15_appellate_courts_statistical_and_operational_report.pdf) [<http://perma.cc/33H9-HJEM>]; N.C. ADMIN. OFF. OF THE CTS., STAT. AND OPERATIONAL REPORT FOR APP. CTS.: 2013–14, at 7, [http://www.nccourts.org/Citizens/SRPlanning/Documents/2013-14\\_appellate\\_courts\\_statistical\\_and\\_operational\\_report.pdf](http://www.nccourts.org/Citizens/SRPlanning/Documents/2013-14_appellate_courts_statistical_and_operational_report.pdf) [<http://perma.cc/JZK8-GPKW>] [hereinafter 2013–2014 NCAOC REPORT]; N.C. ADMIN. OFF. OF THE CTS., STAT. AND OPERATIONAL REPORT FOR APP. CTS.: 2012–13, at 7–8, [http://www.nccourts.org/Citizens/SRPlanning/Documents/2012-13\\_appellate\\_courts\\_statistical\\_and\\_operational\\_report.pdf](http://www.nccourts.org/Citizens/SRPlanning/Documents/2012-13_appellate_courts_statistical_and_operational_report.pdf) [<http://perma.cc/UD2V-7VU2>].

the supreme court's caseload.<sup>112</sup> Moreover, even assuming that the current pattern continues, it would still take decades for the supreme court's caseload to reach a volume comparable to that of the Bell Report-era.

*C. Legislative Changes to North Carolina's Judicial Elections*

Aside from the secrecy surrounding the alleged 2013 court-packing attempt by Republican members of the North Carolina Senate Rules Committee,<sup>113</sup> most of the current legislature's other controversial changes have not gone unnoticed. Since Republicans took control of the North Carolina General Assembly in 2011, "key provisions of the state's sharp political swing to the right have been challenged in state and federal court."<sup>114</sup> And although many of these challenges were unrelated to the state's judicial branch,<sup>115</sup> they nonetheless indicate that the General Assembly is both willing and able to make drastic, controversial changes.

112. Order Adopting Rule 31.1 of Appellate Procedure, 369 N.C. \_\_, \_\_ (Dec. 22, 2016) (adopting procedure for rehearing en-banc). In December of 2016, the North Carolina General Assembly passed Senate Bill 4, which abolished the "appeal of right" to the supreme court in superior court and court of appeals cases involving facial constitutional challenges. Act of Dec. 16, 2016, ch. 125, sec. 22(b), § 7A-27, 2017 N.C. Sess. Laws 10, 31 (codified at N.C. GEN. STAT. § 7A-27 (2017)); see also John V. Orth, *Recent Developments in North Carolina Property Law: Where's the Supreme Court of North Carolina?*, 95 N.C. L. REV. 1561, 1566–67 (2017). Under this new bill, superior court cases that were traditionally routed directly to the supreme court will now first be heard by the court of appeals. *Id.* Accordingly, this change—although beneficial in some respects—will likely result in a higher court of appeals caseload and lower supreme court caseload. See *id.* at 1595.

113. See Warren, *supra* note 68, at 324 ("Less candidly, Republican members of the North Carolina Senate Rules committee attempted to expand the breadth of a pending Senate Bill, SB 10, to increase the size of the North Carolina Supreme Court from seven members to nine members." (citing Raftery, *supra* note 5)); *supra* text accompanying notes 7–9.

114. Annie Blythe, *A Judge, a Vegas Phone Call and the NC GOP Legislative Effort to Remake the Judicial Branch*, NEWS & OBSERVER (Aug. 26, 2017, 4:59 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article168661047.html> [http://perma.cc/XT3Q-WWWN]. As a result of these challenges, legislators have spent over \$13 million on legal representation. *Id.*

115. Courts have, for instance, reviewed the legislature's attempts to ban same-sex marriage, strip teachers of tenure, require doctors providing abortions to perform an ultrasound and describe the sonogram image in detail, allow magistrates to opt out of performing same-sex marriages, requiring people in schools and other government facilities to use bathrooms matching the gender on their birth certificates, establish school voucher programs, and offer pro-choice messages on license plates. Annie Blythe, *Courts are Roadblocks to NC Lawmakers' Right Turn*, NEWS & OBSERVER (Aug. 21, 2016, 11:10 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article96889712.html> [http://perma.cc/SD9Y-8UGN].

## 1. Retention Election Law

Perhaps the most controversial law proposing to modify the state's judicial election process over the past several years was House Bill 222 (the "retention election law"). Proposed in March 2015, the first version of the bill provided that supreme court justices *and* court of appeals judges "who [were] elected to that office at the most recent election" and were running for re-election would "be subject to approval by nonpartisan ballot at the general election immediately preceding the expiration of the term."<sup>116</sup> If the majority of the votes were in favor of the justice's retention, then they would be retained for another term of eight years.<sup>117</sup> If the justice received more "against" votes, however, the seat was considered vacant, meaning that the Governor would appoint someone to fill the seat until the next election.<sup>118</sup>

If the first version of House Bill 222 had been adopted, the retention election process would have applied to five incumbent judges in the 2016 election: supreme court Justice Robert "Bob" Edmunds and appellate court Judges Bob Hunter, Richard Dietz, Valerie Zachary, and Linda Stephens.<sup>119</sup> Of these five incumbents, court of appeals Judge Linda Stephens was the only one "tied to Democrats."<sup>120</sup> A revised copy of House Bill 222, however, limited the bill's scope solely to supreme court justices,<sup>121</sup> meaning that Judge Stephens would face a contested 2016 election—notably, against Phil Berger, Jr., the son of North Carolina Senate Leader Phil Berger.<sup>122</sup> Republican Governor Pat McCrory signed this revised version into law in June 2015.<sup>123</sup>

The new retention election process, however, was short-lived. Several months after House Bill 222 became law, it was challenged as facially unconstitutional.<sup>124</sup> In March 2016, a three-judge panel of the

116. H.B. 222, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (as passed 1st House reading, Mar. 12, 2015).

117. *Id.*

118. *Id.*; see also *supra* text accompanying notes 95–97.

119. See Colin Campbell, *Four Incumbents Face Challengers on NC Court of Appeals*, NEWS & OBSERVER (Dec. 23, 2015, 1:55 PM), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article51126580.html> [<http://perma.cc/ZR4X-RD23>].

120. *Id.*

121. H.B. 222, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015) (as engrossed, June 1, 2015).

122. Campbell, *supra* note 119.

123. Act of June 11, 2015, ch. 65, § 7A-4.1, 2015 N.C. Sess. Laws 149, 149 (2015) (codified at N.C. GEN. STAT. § 7A-4.1 (2017)).

124. *Faires v. State Bd. of Elections*, No. 15CVS15903, 2016 WL 865472, at \*1 (N.C. Super. Ct. Mar. 4, 2016).

Wake County Superior Court found the law unconstitutional, concluding that a “retention election is not an ‘election’... as required by the constitution” and that the law added “an additional qualification for the office of supreme court justice that the candidate must be the incumbent justice.”<sup>125</sup> The government immediately appealed the decision to the Supreme Court of North Carolina, but the six deciding justices were split evenly on the issue.<sup>126</sup> This deadlock ultimately resulted in a per curiam opinion upholding the superior court decision.<sup>127</sup> Accordingly, because this opinion was issued in May 2016, the retention election process was not in place during the November 2016 supreme court election.

## 2. Party Affiliation Laws

Conservative legislators in support of the retention election law claimed that this change would help keep “partisanship out of Supreme Court elections.”<sup>128</sup> Yet, the selectiveness of this rationale is made clear when viewed in conjunction with other legislation passed during the 2015 legislative session. House Bill 8, also introduced in 2015, provided that political party affiliations must be listed next to the names of all prospective court of appeals judges—but not supreme court justices—on election ballots.<sup>129</sup> This bill was signed into law in October 2015, and, unlike the retention election law, remained in effect during the 2016 election.<sup>130</sup>

But after incumbent (Republican) Justice Edmunds lost his supreme court seat in the 2016 election,<sup>131</sup> the legislature felt it immediately necessary to expand House Bill 8’s scope. Just five weeks after Democrats gained a 4-3 majority on the supreme court, the General Assembly passed Senate Bill 4, which extended the new

125. *Id.* at \*1–2. In North Carolina, “[a] suit that makes a ‘facial challenge’ to the constitutionality of an act of the General Assembly is heard by a special three-judge superior court.” Orth, *supra* note 112, at 1566.

126. Because Justice Edmunds recused himself from the case, it was decided by six, rather than seven, justices. See *Faires v. State Bd. of Elections*, 368 N.C. 825, 825, 784 S.E.2d 463, 464 (2016) (per curiam).

127. *Id.*

128. See Melissa Price Kromm, *NC Retention Law Simply a Move to Guarantee Conservative Court*, NEWS & OBSERVER (June 18, 2015, 5:16 PM), <http://www.newsobserver.com/opinion/op-ed/article24904384.html> [<http://perma.cc/MC2N-MCGL>].

129. Act of Oct. 29, 2015, ch. 292, sec. 2, § 163-323, 2015 N.C. Sess. Laws 1461, 1461–62 (2015) (repealed 2017).

130. *Id.*

131. See *North Carolina Supreme Court Results: Michael Morgan Wins*, N.Y. TIMES (Aug. 1, 2017, 11:26 PM), <https://www.nytimes.com/elections/results/north-carolina-supreme-court-justice-edmunds-seat> [<http://perma.cc/946F-3CPP> (dark archive)].



party affiliation law to elections for the Supreme Court of North Carolina.<sup>132</sup> Yet, Republican lawmakers maintained that this change was wholly unrelated to the unseating of Edmunds—even despite the bill’s post-election timing, the fact that this change “had to be taken up in a special session outside the traditional legislative process,” and the lack of any indication that lawmakers originally sought to include the supreme court in House Bill 8.<sup>133</sup>

Again, several months later, in March 2017, the legislature passed House Bill 100, thereby extending the party affiliation law even further.<sup>134</sup> This new bill restored party primaries for superior court and district court elections and required political affiliations on all trial court election ballots.<sup>135</sup> Predictably, this change encountered renewed Democratic opposition. Governor Roy Cooper openly opposed the bill and Republicans’ “divisive political agenda[.]” arguing that “judges should be elected based on experience and ability, not political party.”<sup>136</sup> North Carolina judges also expressed concerns about the bill, noting its adverse impact on unaffiliated candidates and the lack of any added benefit to voters.<sup>137</sup> Ultimately, however, Republicans were again successful, with House Bill 100 even garnering enough support to survive Governor Cooper’s first legislative veto.<sup>138</sup>

### 3. Ballot Order Laws

In July 2016, just months after the retention election law was deemed unconstitutional, the North Carolina General Assembly made yet another modification to the state’s judicial election process

132. Act of Dec. 16, 2016, ch. 125, sec. 21(c), (g), §§ 163-107(b), 165.5(a)(4), 2016 N.C. Sess. Laws 10, 26, 29–30 (codified as amended at N.C. GEN. STAT. §§ 163A-980(b), 1112(4) (2017)); Anne Blythe, *NC Lawmakers Create Partisan Election Process for Courts that Review Their Laws*, NEWS & OBSERVER (Dec. 17, 2016, 6:48 AM), <http://www.newsobserver.com/news/politics-government/state-politics/article121449157.html> [https://perma.cc/5XFJ-GBTR].

133. See Blythe, *supra* note 132. According to Republican legislators, this change “simply allows the voters of North Carolina to simply make an informed choice.” *Id.*

134. See Act of Mar. 23, 2017, ch. 3, sec. 5, § 163-106, 2017 N.C. Sess. Laws 1, 2–3 (2017) (codified at N.C. GEN. STAT. §§ 163A-974(a), -977(a) (2017)).

135. *Id.*; Craig Jarvis & Anne Blythe, *Veto Override Means Voters Will Know Judges’ Party Affiliations*, NEWS & OBSERVER (March 23, 2017, 7:19 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article140327188.html> [https://perma.cc/TCB9-9C9J].

136. Jarvis & Blythe, *supra* note 135.

137. See *id.* Specifically, Tom Lock, a superior court judge in Johnston County, stated, “I just don’t think that one piece of information says doodily squat about the judge or about their philosophy.” *Id.*

138. See Act of Mar. 23, 2017, sec. 5, § 163-106, 2017 N.C. Sess. Laws at 2–3.

with Senate Bill 667. This new bill—passed during the second of five special legislative sessions held in 2016—provided that court of appeals candidates from all major parties should be arranged “in alphabetical order by party beginning with the party whose nominee for Governor received the most votes in the most recent gubernatorial election.”<sup>139</sup>

Again, this change disadvantaged only one incumbent judge in the 2016 election: Democrat Linda Stephens. Based on the random selection process used by the state Board of Elections before the passage of Senate Bill 667, Judge Stephens’ name would have been listed first on the ballot.<sup>140</sup> Under the new bill, however, her name would appear beneath that of her Republican challenger, Phil Berger, Jr.<sup>141</sup> Unsurprisingly, Senate Bill 667 passed along strict party lines on the last day of the special session.<sup>142</sup>

Of course, after Democrats gained control over the Governor’s Mansion in 2016,<sup>143</sup> the new pro-incumbent ballot orders became far less appealing to prior Senate Bill 667 proponents. Accordingly, in March 2017, Republican legislators introduced House Bill 496, which would have restored the randomized ballot name order process that was in place prior to Senate Bill 667.<sup>144</sup> The sponsor of House Bill 496 justified this 180-degree change-of-heart by claiming that random ballot order was “the fairest system that [the legislature] could come

139. Act of July 22, 2016, ch. 109, sec. 3, § 163-165.6(d1)(1), 2016 N.C. Sess. Laws 616, 617 (codified at N.C. GEN. STAT. § 163A-1114(e)(1) (2017)).

140. See Patrick Gannon, *Ballot Order Flip Would Put Republican’s Name First*, NEWS & OBSERVER (July 7, 2016, 5:22 AM), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article87979992.html> [<https://perma.cc/M285-EUQT>].

141. See *id.* This ballot name demotion is considered a disadvantage based on empirical evidence indicating that being listed earlier on the ballot has a significant effect on the percentage of votes that a candidate receives—also known as the “ballot order effect”—especially in elections for low-visibility offices. See, e.g., Yakov Avichai, *Equity in Politics: Name Placement on Ballots*, 4 AM. B. FOUND. RES. J. 141, 143 (1979) (concluding that “all studies find that ballot position accounts in part for voters’ choices” and that “[t]he first position is most advantageous”); David Brockington, *A Low Information Theory of Ballot Position Effect*, 25 POL. BEHAV. 1, 11 (2003) (arguing that the ballot order effect is enhanced by a less informed electorate); John Pasek, et al., *Prevalence and Moderators of the Candidate Name-Order Effect: Evidence from Statewide General Elections in California*, 78 PUB. OPINION Q. 416, 433 (2014) (finding that the order of names on a ballot influenced California election outcomes).

142. Gannon, *supra* note 140.

143. See *infra* Section II.D.1.

144. An Act Regarding the Placement of Candidates on Official Election Ballots, H.B. 496, sec. 1, § 163-165.6(c), 2017 Gen. Assemb., Reg. Sess. (N.C. 2017).

up with.”<sup>145</sup> Democratic critics, in contrast, saw House Bill 496 as “just another in a growing list of examples of how the NC GOP is trying to rig the system in their favor . . . at the expense of open and fair elections in North Carolina.”<sup>146</sup> Ultimately, the bill passed the House but failed to receive enough support in the Senate,<sup>147</sup> thereby reserving Democratic court of appeals candidates the first slot on the November 2018 election ballots (for the time being).

In short, although legislative-made change to the judicial branch is hardly a novel or controversial concept, the fairly apparent partisan motivations behind these recent modifications render a North Carolina court-packing bill more probable than ever. The fact that the vast majority of these bills were successfully signed into law also reinforces both the willingness and the ability of the current North Carolina General Assembly to make swift, sweeping changes to the judicial branch.

#### *D. The November 2016 North Carolina Election*

##### 1. The Results

The results of the November 2016 election proved North Carolina’s reputation as “one of the swingiest of the swing states”<sup>148</sup> truer than ever, with both Democrats and Republicans seeing surprising victories by razor-thin vote margins. The state’s gubernatorial election—“one of the country’s most volatile and expensive races”<sup>149</sup>—between incumbent Republican, Pat McCrory, and his Democratic challenger, Roy Cooper, was ultimately decided in favor of Cooper by a microscopic .22% margin.<sup>150</sup> With this loss,

145. Colin Campbell, *NC House OKs Random Ballot Order to Avoid Listing Democrats First in 2018*, NEWS & OBSERVER (April 26, 2017, 3:03 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article146781374.html> [https://perma.cc/RfV5-2XV4].

146. *Id.*

147. See H.B. 496, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017).

148. *North Carolina Results*, N.Y. TIMES (Aug. 1, 2017, 11:22 AM), <http://www.nytimes.com/elections/results/north-carolina> [http://perma.cc/9P7S-AFEE (dark archive)].

149. Monica Davey & Alan Blinder, *In North Carolina, a Governor’s Race is Too Close to Call*, N.Y. TIMES (Nov. 9, 2016), [https://www.nytimes.com/2016/11/09/us/politics/governors-races-statehouses-eric-holcomb.html?\\_r=0](https://www.nytimes.com/2016/11/09/us/politics/governors-races-statehouses-eric-holcomb.html?_r=0) [https://perma.cc/3TJK-F75E (dark archive)].

150. See *11/08/2016 Official General Election Results – Statewide (Council of State)*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT (Dec. 13, 2016, 10:42 AM), [http://er.ncsbe.gov/?election\\_dt=11/08/2016&county\\_id=0&office=COS&contest=0](http://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=COS&contest=0) [https://perma.cc/QE67-ZZMG]. Cooper defeated McCrory by less than 11,000 votes in an election with over 4.7 million. *Id.*

McCrory became the state's first Governor since 1850 to be defeated for re-election in a regular, general election.<sup>151</sup>

In contrast, when viewed in light of the ballot order and party affiliation laws, the court of appeals races were decided as one would expect. The three Republican incumbent court of appeals judges up for re-election (Judges Dietz, Hunter, and Zachary) each secured their seats with a comfortable 54% of the vote.<sup>152</sup> The lone Democratic incumbent, however, was not as lucky. Linda Stephens—listed last and designated as a Democrat on the ballot—lost her seat to challenger Phil Berger, Jr. by a less than .5% margin.<sup>153</sup> Of the nearly 4.5 million votes cast, Berger defeated Stephens by approximately 22,000.<sup>154</sup> When broken down by county, the majority of Berger's losses were in urban and primarily African American counties.<sup>155</sup>

Perhaps the most significant election result, however, was the race for the Supreme Court of North Carolina. The challenger, Michael “Mike” Morgan, defeated the incumbent, Justice Bob Edmunds, by over 350,000 votes—a near 10% margin of victory.<sup>156</sup> This conquest marked an ideological shift of the supreme court, ushering in a new era of Democratic majority.<sup>157</sup> Even more surprising than the landslide results were the areas in which the African American Democratic candidate received support: despite winning

151. See John Wynne, *No NC Governor has Lost Reelection Since 1892*, POL. N.C. (Feb. 17, 2015), <https://www.politicsnc.com/no-nc-governor-has-lost-reelection-since-1892/> [http://perma.cc/64GA-CKAP]. Notably, however, North Carolina's constitution did not permit two-term Governors until 1977. *Id.*

152. See *11/08/2016 Official General Election Results – Statewide (Judicial)*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT (Dec. 13, 2016, 10:42 AM), [http://er.ncsbe.gov/?election\\_dt=11/08/2016&county\\_id=0&office=JUD&contest=0](http://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=JUD&contest=0) [https://perma.cc/W5SA-VRYF].

153. *Id.*

154. See *id.*

155. Doug Clark, *Morgan's Supreme Court Win was Helped by Lack of Party Label on the Ballot*, NEWS & REC. (Nov. 9, 2016), [http://www.greensboro.com/blogs/clark\\_off\\_the\\_record/morgan-s-supreme-court-win-was-helped-by-lack-of/article\\_7c179dea-a68c-11e6-9682-7b8f40afd0f6.html](http://www.greensboro.com/blogs/clark_off_the_record/morgan-s-supreme-court-win-was-helped-by-lack-of/article_7c179dea-a68c-11e6-9682-7b8f40afd0f6.html) [https://perma.cc/9ZKR-TEVP]; see *11/08/2016 Official General Election Results – Statewide (Judicial): NC Court of Appeals Judge (Stephens) (Vote for 1)*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT (Dec. 13, 2016, 10:42 AM), [http://er.ncsbe.gov/contest\\_details.html?election\\_dt=11/08/2016&county\\_id=0&contest\\_id=1198](http://er.ncsbe.gov/contest_details.html?election_dt=11/08/2016&county_id=0&contest_id=1198) [https://perma.cc/63CQ-GWHC].

156. See *North Carolina Supreme Court Results: Michael Morgan Wins*, N.Y. TIMES (Aug. 1, 2017, 11:26 AM), <https://www.nytimes.com/elections/results/north-carolina-supreme-court-justice-edmunds-seat> [https://perma.cc/946F-3CPP (dark archive)]. Morgan received 2,134,650 votes, while Edmunds received 1,785,437. *Id.*

157. See Clark, *supra* note 155.

some heavily Republican counties, Morgan actually won *fewer* votes than other Democratic candidates in primarily Democratic areas.<sup>158</sup>

## 2. Explaining the Conflicting Outcomes

Notwithstanding the historic nature of McCrory's loss, the outcome of the gubernatorial election was somewhat anticipated. Even with experience, history, and a thriving economy on McCrory's side, the state's highly conservative and Republican-controlled legislature harmed the ex-Governor's softer, "business conservative" image he had exerted during his 2012 gubernatorial campaign.<sup>159</sup> Indeed, polls conducted months before the election indicated that passage of the contentious H.B. 2 negatively influenced McCrory's popularity,<sup>160</sup> even though this law was a product of the General Assembly, rather than McCrory himself.

But the contrasting results of North Carolina's 2016 judicial elections—Berger's narrow victory and Edmunds' sweeping defeat—cannot be explained by mere popularity. At the time of the 2016 election, Democratic incumbent, Linda Stephens, had been on the court of appeals for more than a decade, had "earned a reputation as a thoughtful and no-nonsense judge," and was credited with many accomplishments throughout her lengthy legal career in North Carolina.<sup>161</sup> Further evidence of Stephens's popularity can be found in

158. *Id.*; see *11/08/2016 Official General Election Results – Statewide (Judicial): NC Supreme Court Associate Justice (Vote for 1)*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT (Dec. 13, 2016, 10:42 AM), [http://er.ncsbe.gov/contest\\_details.html?election\\_dt=11/08/2016&county\\_id=0&contest\\_id=1393](http://er.ncsbe.gov/contest_details.html?election_dt=11/08/2016&county_id=0&contest_id=1393) [<http://perma.cc/XK7S-D2MJ>].

159. Rob Christensen, *Why NC's First GOP Governor in a Generation Lost – Christensen*, NEWS & OBSERVER (Dec. 11, 2016, 4:24 PM), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/rob-christensen/article119693873.html> [<http://perma.cc/EYT8-NBPQ>].

160. See *Prez and Senate Races Tight; HB2 Drag on Gov. McCrory Re-Elect Bid*, MONMOUTH UNIV. POLLING INST. (Aug. 24, 2016), [https://www.monmouth.edu/polling-institute/reports/MonmouthPoll\\_NC\\_082416/](https://www.monmouth.edu/polling-institute/reports/MonmouthPoll_NC_082416/) [<http://perma.cc/TFV7-3D59>] (finding that 55% disapprove of H.B. 2 (72% of which were not voting for McCrory), 36% approve of HB 2 (74% of which were voting for McCrory), and 70% believe that H.B. 2 had harmed North Carolina's national reputation).

161. Capital Broad. Co. Editorial, *Stand Up to Legislative Ballot Rigging: Keep Linda Stephens on the N.C. Court of Appeals*, WRAL (Oct. 27, 2016), <http://www.wral.com/stand-up-to-legislative-ballot-rigging-keep-linda-stephens-on-the-n-c-court-of-appeals/16166704/> [<http://perma.cc/FUY8-E76H>]; see also *The INDY's Endorsements for the N.C. Court of Appeals*, INDY WEEK (Oct. 19, 2016), <https://www.indyweek.com/indyweek/the-indys-endorsements-for-the-nc-court-of-appeals/Content?oid=5077224> [<http://perma.cc/PS5G-ZNML>] (describing Stephens as "a trailblazer and qualified candidate" with significant endorsements); Linda Stephens, HEDRICK GARDNER, <http://www.hedrickgardner.com/attorneys/linda-stephens> [<https://perma.cc/J8PG-Z3PE>] (noting that Judge Stephens was

her landslide 2008 victory, in which she received nearly 59% of the vote.<sup>162</sup> In contrast, Stephens's Republican challenger was the lesser-known and less experienced candidate.<sup>163</sup> In a 2014 primary for a North Carolina senate seat (Berger's only prior attempt at running for office) the state senate leader's son lost decisively after receiving less than 13,000 votes.<sup>164</sup>

The 2016 supreme court candidates share more comparable backstories. Sixteen-year supreme court veteran, Bob Edmunds, had a lengthy and prestigious legal career in his home state.<sup>165</sup> His challenger, Mike Morgan, also had extensive experience in the North Carolina judiciary, with twenty-one years spent as a superior court judge.<sup>166</sup> But given Edmunds's two prior electoral victories, as well as the 2016 primary election results, the incumbent Republican appeared to be the favored candidate.<sup>167</sup>

Edmunds's loss was therefore unanticipated by many analysts and political experts and left many searching for answers.<sup>168</sup> Some

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the first female law clerk for Court of Appeals Judge Fred Hedrick, the first female associate at a Raleigh law firm, and its first female partner only five years later).

162. See *2008 General Election*, N.C. ST. BOARD ELECTIONS (March 17, 2010), <http://results.enr.clarityelections.com/NC/7937/21334/en/summary.html#> [https://perma.cc/J53Q-9JDZ].

163. Staff Reports, *Phil Berger Jr. Seeking Seat on N.C. Court of Appeals*, NEWS & REC. (Dec. 17, 2015), [http://www.greensboro.com/news/government/elections/phil-berger-jr-seeking-seat-on-n-c-court-of/article\\_699fe7f7-f7da-567a-9834-ea6a0cacb5e8.html](http://www.greensboro.com/news/government/elections/phil-berger-jr-seeking-seat-on-n-c-court-of/article_699fe7f7-f7da-567a-9834-ea6a0cacb5e8.html) [https://perma.cc/DR57-MZFD].

164. See Craig Jarvis, *Walker Defeats Berger in NC 6th Congressional District*, CHARLOTTE OBSERVER (July 15, 2014, 9:44 PM), <http://www.charlotteobserver.com/news/local/article9140948.html> [https://perma.cc/8PDH-S8YM].

165. Edmunds's career included experience as a Navy line officer, an Assistant United States District Attorney, a partner at a North Carolina law firm, and a North Carolina Court of Appeals judge. See *Welcome*, RE ELECT JUST. EDMUNDS, <http://www.justiceedmunds.com/#welcome> [https://perma.cc/58LX-36CS].

166. See *Meet Judge Morgan*, JUDGE MIKE MORGAN, <http://www.judgemikemorgan.com/profile/> [http://perma.cc/4A9N-QKDN].

167. See *North Carolina Supreme Court Elections*, BALLOTPEDIA, [https://ballotpedia.org/North\\_Carolina\\_Supreme\\_Court\\_elections#2000](https://ballotpedia.org/North_Carolina_Supreme_Court_elections#2000) [https://perma.cc/75KB-EBTG] (indicating that Edmunds won the 2000 supreme court election by over 100,000 votes); *11/04/2008 Official General Election Results – Statewide (Judicial)*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT (Nov. 14, 2008), [http://er.ncsbe.gov/?election\\_dt=11/04/2008&county\\_id=0&office=JUD&contest=0](http://er.ncsbe.gov/?election_dt=11/04/2008&county_id=0&office=JUD&contest=0) [http://perma.cc/Q2QC-C45X] (indicating that Edmunds won the 2008 supreme court election by over 60,000 votes); see *06/07/2016 Official Local Election Results – Statewide (Judicial): NC Supreme Court Associate Justice (Vote for 1)*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT (July 20, 2016), [http://er.ncsbe.gov/contest\\_details.html?election\\_dt=06/07/2016&county\\_id=0&contest\\_id=1040](http://er.ncsbe.gov/contest_details.html?election_dt=06/07/2016&county_id=0&contest_id=1040) [https://perma.cc/A7MT-8DET] (indicating that Edmunds defeated Mike Morgan in the 2016 primaries by over thirteen percent).

168. See Anne Blythe & Lynn Bonner, *Rare Big Win for Democrats Tilts Party Balance on NC Supreme Court*, CHARLOTTE OBSERVER (Nov. 10, 2016, 8:25 PM),

observers believed that the results stemmed simply from merit, based on a “campaign that pitted Edmunds’ record on the supreme court bench with Morgan’s record as a superior court judge.”<sup>169</sup> Alternatively, the fact that Morgan obtained endorsements from high-profile Democrats, including then President Barack Obama, may have contributed to his success.<sup>170</sup> Still others opined that the enormous amount of money spent on the campaign—over \$5 million—was influential, especially since one liberal super PAC “spent over \$1.7 million opposing Edmunds.”<sup>171</sup>

But when viewed in conjunction with the court of appeals race, it is unlikely that these factors alone were responsible for Morgan’s unexpected victory. Because neither the ballot order law nor the party affiliation law applied to the 2016 *supreme court* election, Morgan’s name was listed first on the ballot, and voters were not provided with either candidate’s party affiliation.<sup>172</sup> It therefore seems likely that some voters unfamiliar with either candidate assumed that the name listed first was Republican, meaning that those “voting Republican down the ballot simply became accustomed to filling in the top line and, as a result, voted for Morgan.”<sup>173</sup> This conclusion is further bolstered by data indicating the unbranded Morgan was significantly more successful than Stephens in Republican counties

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<http://www.charlotteobserver.com/news/politics-government/article114053308.html> [<https://perma.cc/55FP-Y8TS>] (noting that North Carolinians were still “trying to decipher the reasons” for Morgan’s “curious” victory); Doug Clark, *Surprising Court Outcome Might Have Been Accidental*, NEWS & REC. (Nov. 16, 2016), [http://www.greensboro.com/blogs/clark\\_off\\_the\\_record/doug-clark-surprising-court-outcome-might-have-been-accidental/article\\_7a0b3361-92d1-5fea-b878-ffde9ed1a645.html](http://www.greensboro.com/blogs/clark_off_the_record/doug-clark-surprising-court-outcome-might-have-been-accidental/article_7a0b3361-92d1-5fea-b878-ffde9ed1a645.html) [<http://perma.cc/E698-KUE5>] (describing Morgan’s victory as “perhaps the biggest surprise of a stunning election night”); John Trump, *Ballot Placement May Have Aided Morgan’s Supreme Court Win*, CAROLINA J. (Nov. 10, 2016, 4:10 AM), <https://www.carolinajournal.com/news-article/ballot-placement-may-have-aided-morgans-supreme-court-win/> [<https://perma.cc/JL4T-77Q2>] (explaining how Morgan’s victory “defied [] expectations” of political experts and analysts).

169. Cindy Kehler, *Supreme Court Incumbent Ousted in North Carolina; Incumbents Prevail in Three Other Most-Watched State Supreme Court Races*, BALLOTPEDIA (Nov. 10, 2016), [https://ballotpedia.org/Supreme\\_court\\_incumbent\\_ousted\\_in\\_North\\_Carolina:\\_incumbents\\_prevail\\_in\\_three\\_other\\_most-watched\\_state\\_supreme\\_court\\_races](https://ballotpedia.org/Supreme_court_incumbent_ousted_in_North_Carolina:_incumbents_prevail_in_three_other_most-watched_state_supreme_court_races) [<https://perma.cc/TXK8-CV5N>].

170. Trump, *supra* note 168 (noting that “Morgan’s visibility in the black community was higher than that of Edmunds” and that there was a “bigger Democratic effort” to support Morgan).

171. Alex Kotch, *REPORT: North Carolina’s 2016 State Elections Smashed Outside Spending Records*, FACING SOUTH (Feb. 22, 2017), <https://www.facingsouth.org/2017/02/report-north-carolinas-2016-state-elections-smashed-outside-spending-records> [<https://perma.cc/5XKS-725B>].

172. See *supra* Sections II.C.2 & II.C.3; Blythe & Bonner, *supra* note 168.

173. Trump, *supra* note 168.

and considerably less successful in Democratic areas.<sup>174</sup> Equally compelling is the fact that nearly 500,000 fewer North Carolinians voted in the supreme court race than they did for the court of appeals.<sup>175</sup> This suggests that many voters who were unacquainted with either candidate simply forewent voting in the supreme court race altogether.

This comparison therefore seems to be the most compelling indication of the General Assembly's partisan influence on the state's judicial composition. Had the retention election law been upheld, the result of the supreme court election may very well have been different: if Edmunds had received a majority of votes at the expiration of his term, Morgan would never have had the opportunity to challenge Edmunds. Moreover, had the ballot order law and party affiliation law not applied to the court of appeals race, the chances of Stephens being elected likely would have been much higher, as she, like Morgan, would have appeared first on the ballot without her party affiliation. Similarly, if these two laws *had* applied to the supreme court race—as they do now—the race would likely have been much closer. In sum, although the degree to which these laws affected the results of the 2016 judicial election remains unknown, the juxtaposition of Morgan's victory and Stephens's loss renders the legislature's impact undeniable.

### 3. Impact on the North Carolina Court-Packing Debate

Aside from providing concrete evidence of legislative interference, the 2016 election also impacted the North Carolina court-packing debate for a wholly separate reason. Now that a Democratic Governor holds both the legislative veto and the appointment power for all newly created judgeships, it would seem that the current, Republican-controlled General Assembly would be neither able nor willing to pass court-packing legislation. However, for several reasons, the practical impact of this change in power is likely much smaller than it seems.

First, the post-2016 legislature has not deviated from its pre-Cooper pattern of judicial interference—if anything, it has been even more emboldened to limit the Governor's power. For example, in 2017, the General Assembly passed House Bill 239, which eliminated

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174. See *supra* notes 155, 158, and accompanying text.

175. While nearly 4.5 million votes were cast in the court of appeals race, the supreme court race was decided by less than 4 million. See *11/08/2016 Official General Election Results – Statewide (Judicial)*, *supra* note 152.



three court of appeals justices,<sup>176</sup> and Senate Bill 656, which abolished 2018 judicial primary elections.<sup>177</sup> Both of these laws were vetoed by Governor Cooper, and both of his vetoes—along with eight others—were overridden by the legislature.<sup>178</sup> Accordingly, it is clear that the General Assembly still maintains significant control over the state’s judicial landscape, even without an ally in the Governor’s Mansion. And because of the duration of Republicans’ control, their legislative agenda is flexible—i.e., they have the time to focus on these types of issues, rather than typical, “big-ticket” items.<sup>179</sup>

Second, the legislature has shown no hesitation in attempting to curtail Governor Cooper’s appointment power. Indeed, through House Bill 239, the Governor’s court of appeals appointment power has already been limited. Before its passage, Cooper “was poised to appoint judges to fill at least two Appeals Court seats because of Republicans leaving due to mandatory retirement.”<sup>180</sup> Now, upon those judges’ retirement, the seats will simply be eliminated altogether. Two other bills proposed in 2017, House Bills 240 and 24, would have completely removed Cooper’s appointment power for district courts and superior courts, respectively.<sup>181</sup>

Relatedly, although Governor Cooper’s supreme court appointment power could not be officially eliminated without a constitutional amendment or reversal of supreme court precedent,<sup>182</sup> the passage of such a bill is not an unrealistic possibility. Already in 2018, a constitutional amendment creating two-year term limits for all state judges and providing that “[a]ll terms of office for persons elected prior to July 1, 2018, to the office of Justice of the Supreme

176. Act of Apr. 26, 2017, ch. 7, sec. 1, § 7A-16, 2017 N.C. Sess. Laws 37, 37–38 (2017) (codified at N.C. GEN. STAT. 7A-16 (2017)).

177. Act of Oct. 17, 2017, ch. 214, sec. 4.(a), 2017 N.C. Sess. Laws 176, 179–80.

178. Anne Blythe, *Roy Cooper Sues NC Lawmakers Again—Over Appeals Court and Industrial Commission Appointments this Time*, NEWS & OBSERVER (May 26, 2017, 3:37 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article152887174.html> [<http://perma.cc/8NK8-7TNT>]; *Veto Overrides Mark Democratic Governor’s 1st Year*, abc11 (Oct. 16, 2017), <http://abc11.com/politics/veto-overrides-mark-democratic-governors-1st-year/2541265/> [<http://perma.cc/WRQ4-23AP>].

179. Jason Zengerle, *Is North Carolina the Future of American Politics?*, N.Y. TIMES MAG. (June 20, 2017), [https://www.nytimes.com/2017/06/20/magazine/is-north-carolina-the-future-of-american-politics.html?\\_r=0](https://www.nytimes.com/2017/06/20/magazine/is-north-carolina-the-future-of-american-politics.html?_r=0) [<http://perma.cc/GQ5X-2K5M> (dark archive)].

180. Chris Kromm, ‘Open War Against the Judiciary’, FACING SOUTH (Mar. 10, 2017), <https://www.facingsouth.org/2017/03/open-war-against-judiciary> [<http://perma.cc/X9AJ-D8AN>].

181. *Id.*

182. See *supra* Section II.A.

Court, Judge of the Court of Appeals, or regular Judge of the Superior Court shall expire December 31, 2018” has been proposed.<sup>183</sup>

Finally, even if the legislature is unable or unwilling to pass a constitutional amendment, it may still wish to create new supreme court seats, even if it means that Governor Cooper would temporarily fill them. Because the North Carolina Constitution provides that the Governor’s appointee shall only serve until the next General Assembly election, the legislature, with proper planning, could limit the Governor’s appointee to a term of only sixty-one days.<sup>184</sup>

### III. PREREQUISITE CONSIDERATIONS FOR STATE SUPREME COURT EXPANSION

As evidenced by the widespread reactions to President Roosevelt’s proposal and the various state-level court-packing attempts over the past decade, successful court-packing legislation cannot rest on constitutional authority alone. To maintain public confidence in the judicial branch of government, those seeking to expand state supreme courts must first analyze several non-partisan objective factors, including: the practical necessity of additional justices, the cost to citizens, and the impact of court-packing legislation on judicial integrity. Without a careful analysis of these neutral factors, supreme court expansion will jeopardize the effectiveness and accountability of the judiciary, even if there is already constitutional authority for this change.

In North Carolina, as explained in Section II.A, the constitutional basis for court-packing is a nonissue: the legislature may add two supreme court justices, to be appointed by the Governor, without amending the North Carolina Constitution.<sup>185</sup> However, the current workload of the supreme court, the financial state of the judicial branch, and the General Assembly’s pervasive interference nonetheless weigh strongly against the implementation of a North Carolina court-packing law.

#### A. *Practical Necessity of Additional Justices*

Determining whether additional justices are actually necessary to effectuate the fundamental goals of the judicial branch should be the

183. An Act to Amend the North Carolina Constitution to Allow Frequent Election of Judges by Creating Two-Year Terms of Office for Justices and Judges, S.B. 698, sec 1.(b), 2017 Gen. Assemb., Gen. Sess. (N.C. 2018).

184. See ORTH & NEWBY, *supra* note 102, at 141.

185. See *supra* Section II.A.

first consideration of any court-packing plan—not because it is the most imperative consideration, but simply because it may be dispositive. Of course, there are unique instances in which modifying the structure or size of the judiciary is the only conceivable solution to remedying extreme cases of judicial inefficiency. However, as exemplified by the Bell Report’s recommendation to create the North Carolina Court of Appeals, court-packing is rarely ever the *only* sufficient option.<sup>186</sup> Accordingly, when evaluating the practical necessity of additional justices, several indicia should be thoroughly reviewed, including the workload of the court, the efficiency of the court, and the state’s population.

Regarding North Carolina specifically, the relatively small workload of supreme court justices seems to weigh against the argument for adding more justices. In contrast, claims of judicial inefficiency and increasing population statistics appear, at first glance, to support analogous arguments made by Arizona and Georgia court-packing proponents. These analogies break down, however, when the drastic population and structural differences between these three states are taken into account.

### 1. Caseload, Judicial Efficiency, and Population Growth

Perhaps the most obvious of the three “practical necessity” considerations is the workload of the court. An increase in the volume of litigation logically leads to justices spending more time hearing cases and writing opinions. If ignored, this pattern can eventually lead to an overworked court, the adverse affects of which extend beyond issues relating to inefficiency. Placing too much responsibility on judges may, for example, lead to decreased scrutiny of lower court decisions<sup>187</sup> and greater reliance on subordinates for certain decision-making responsibilities.<sup>188</sup> An increasing caseload may also compel courts “to choose how to increase their decision-making capacity,”<sup>189</sup> which can lead to many of these same adverse

186. BELL REPORT, *supra* note 102, at 10. Because of the enormous workload of the Supreme Court of North Carolina in 1958, it was recommended “that the General Assembly be *authorized* to increase the number of Associate Justices to not more than eight.” *Id.* (emphasis added). However, because the Committee did not believe that this increase would be sufficient, it also noted, “It seems wise to make it possible, when the need therefore becomes clear and manifest, to establish an intermediate appellate court as a part of the appellate division.” *Id.*

187. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 30–31 (2013).

188. See *id.* at 26.

189. *Id.* at xii.

results, as well as less time and effort being spent hearing and deciding cases and more per curiam (and, therefore, nonbinding) opinions.<sup>190</sup> Relatedly, timely disposition of cases helps fill gaps in existing law. As alleged by Arizona court-packing proponents, the “uncertainty” that stems from “conflicting case law or a lack of precedent” may be remedied by the addition of justices because such expansion would provide the court with the means to hear cases that “warrant attention” without delay.<sup>191</sup>

Measuring the sheer volume of cases that pass through courtroom doors, however, is not the only indicia of practical necessity. An increasing population—or simply projections of one—may also be a relevant consideration. Proponents of Georgia’s court-packing law, for example, placed great weight on this factor, reasoning that two additional Georgia Supreme Court seats were necessary to accommodate the purportedly imminent population boom.<sup>192</sup> A similar rationale was cited in Arizona, with court-packing supporters noting, “A bigger court . . . could handle a bigger workload and perhaps better reflect the diversity of the state. Since Arizona’s Supreme Court was last expanded in 1960, the state has grown considerably—from a population of just over 1 million to nearly 7 million.”<sup>193</sup>

## 2. The Practical Necessity of Additional Supreme Court of North Carolina Justices

Applying these factors to North Carolina, if the workload and population patterns continue to increase at their current rate, this factor may eventually weigh in favor of supreme court expansion. However, based on current data, this expansion does not yet seem practically necessary.

The workload of the supreme court seems to provide the strongest argument against the necessity of additional justices. As discussed in Section II.B, the number of opinions issued by the

190. *See id.* at 22–40; Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1251–54 (2012).

191. ARIZ. CHAMBER OF COMMERCE & INDUS., STRENGTH IN NUMBERS: WHY IT’S TIME TO INCREASE THE SIZE OF THE ARIZONA SUPREME COURT 2–3 (2016), <http://www.azchamber.com/blog/wp-content/uploads/2016/03/StrengthinNumbers.pdf> [https://perma.cc/RT63-3PRG].

192. *See* Torres, *supra* note 86.

193. Alan Greenblatt, *Does Size Matter? The Latest Battle Over State Supreme Courts*, GOVERNING (May 19, 2016, 11:20 AM), <http://www.governing.com/topics/politics/gov-georgia-arizona-supreme-court-expansion.html> [https://perma.cc/T4KU-XG5D].

supreme court has increased in recent years.<sup>194</sup> From 2015 to 2016, the number of written opinions jumped from twenty-nine to forty, where it remained in 2017.<sup>195</sup> From 2014 to 2016, this number practically doubled.<sup>196</sup> However, the court's caseload still does not appear to be within range of needing an additional two justices; for even with this recent increase, each justice is still only responsible for writing five to six opinions per fiscal year. If two more justices were added, this would decrease back to four or five opinions for each justice per year. This number is especially shocking when compared to the judges at the (recently downsized) North Carolina Court of Appeals, who currently average about 100 opinions per year.<sup>197</sup>

Indeed, the supreme court's low caseload may prove equally as harmful as an overcrowded docket. As explained by one North Carolina constitutional scholar, by failing to review lower court decisions, the supreme court is "effectively delegating [its] precedent-setting function to panels of the intermediate appellate court."<sup>198</sup> Because so many crucial constitutional issues have been ignored by the supreme court, the court of appeals has recently emerged as "the de facto court of last resort."<sup>199</sup> Aside from concerns of unfairness, this pattern is also problematic because it limits access to the judicial branch: "Facing the likelihood of adverse decisions in the trial and intermediate appellate courts, only well-resourced litigants adversely affected by a precedent set by a panel of the Court of Appeals will be able to seek the attention of the Supreme Court."<sup>200</sup>

In his 2015 State of the Judiciary address to the General Assembly, Chief Justice Martin expressed a similar sentiment, noting how budget shortfalls—*not* a shortage of justices—led to a "situation where the justice system is unable to promptly serve those who turn to us for help."<sup>201</sup> The Chief Justice also passionately noted,

Our State Constitution guarantees that courts shall be open and that justice shall be administered without delay. Think about what it will mean if the people of this great State cannot rely on

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194. *See supra* Section II.B.

195. *See supra* Table 1.

196. *See supra* Table 1.

197. Letter from N.C. Advocates for Just. to the N.C. Senators, *supra* note 17, at 5.

198. Orth, *supra* note 112, at 1567.

199. *Id.* at 1598.

200. *Id.*

201. Mark Martin, Chief Justice of the Supreme Court of N.C., State of the Judiciary Address to the North Carolina General Assembly 5 (Mar. 4, 2015) (transcript available at <http://pulse.ncpolicywatch.org/wp-content/uploads/2015/03/state-of-the-judiciary-2015-transcript.pdf>) [<https://perma.cc/8LWL-YFD5>].

us to promptly administer justice. How can we explain that to the victims of violent crime and their families? How can we explain that to the small-business owners who need a contract dispute resolved in order to keep their store open and avoid bankruptcy? How can we explain that to the family that lost a loved one because of a drunk driver? We must be able to provide them with justice.<sup>202</sup>

Most notable about this address, however, is the fact that Chief Justice Martin never once mentioned supreme court expansion as a solution to this inefficiency. Of course, as shown through the Arizona legislature's disregard of Chief Justice Bales's objections, even direct recommendations from the judiciary are not always dispositive. However, ignoring a justice's explicit recommendations for alternative solutions seems far more egregious than simply disregarding their *ex post*, general opinion.

Nor do population statistics provide an adequate basis for supreme court expansion. Between 2015 and 2016, North Carolina saw its largest population increase in a single year since 2010,<sup>203</sup> and the state is projected to grow even faster in the coming years, increasing by nearly eleven percent between 2010 and 2020.<sup>204</sup> When taken independently, these statistics reveal an imminent growth in population, and, consequently, an imminent growth in caseload.

However, when viewed in context of other relevant factors, these numbers are far less compelling. According to the U.S. Census Bureau, Georgia and North Carolina were "neck and neck" in terms of population in 2016, with North Carolina landing the number nine spot directly below Georgia.<sup>205</sup> The two states also had nearly identical numeric population growth: North Carolina saw an increase of 111,602 citizens, and Georgia an increase of 110,973.<sup>206</sup> This

202. *Id.*

203. See Rebecca Tippet, *North Carolina Population Growth at Highest Levels Since 2010*, CAROLINA DEMOGRAPHY (Feb. 10, 2017), <http://demography.cpc.unc.edu/2017/02/10/north-carolina-population-growth-at-highest-levels-since-2010/> [https://perma.cc/Q3HF-KPD8]. "The uptick in population growth was fueled by an increase in net migration: North Carolina received 81,000 net migrants between 2015 and 2016," the fifth highest state rate. *Id.*

204. Rebecca Tippet, *Population Growth in the Carolinas: Projected vs. Observed Trends*, CAROLINA DEMOGRAPHY (Dec. 8, 2015), <http://demography.cpc.unc.edu/2015/12/08/population-growth-in-the-carolinas-projected-vs-observed-trends/> [https://perma.cc/HY6A-NHC9].

205. Press Release, U.S. Census Bureau, *Utah is Nation's Fastest-Growing State*, Census Bureau Reports (Dec. 20, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-214.html> [https://perma.cc/RC3A-N7BZ].

206. *Id.*

similarity, however, becomes far less germane to the court-packing discussion when the caseloads of these states are compared. In stark contrast to the Supreme Court of North Carolina's average of forty written opinions per year, the Supreme Court of Georgia issued an average of 432 majority opinions annually between the years of 2013 and 2015.<sup>207</sup> Thus, the effect of an increasing population is far more likely to adversely affect already-overworked Georgia supreme court justices than those of North Carolina. Further, this comparison proves that when assessing the need for additional supreme court justices, a state's current or expected population cannot be viewed in isolation; it must be considered in the context of other practical considerations. While an increasing population—and, eventually, an increasing caseload—may have decreased the efficiency of the Georgia Supreme Court, the same cannot be said for North Carolina's highest court, in which a higher caseload would actually be beneficial, not harmful.

North Carolina can also be distinguished from Arizona in this context. Again, when looking solely at the census statistics, it seems as though any population-based argument made by Arizona should surely extend to North Carolina. From 2015 to 2016, Arizona's population jumped by 113,506—equating to a less than 2,000-person difference between its population and North Carolina's population—to a total of 6,931,071.<sup>208</sup>

When evaluating how much weight to give these statistics, however, context is again determinative. Most notably, the Supreme Court of North Carolina can be distinguished from the Arizona Supreme Court because the latter only had five justices prior to passing its court-packing legislation, while North Carolina currently has seven. This effectively means that the Arizona court-packing bill merely put the court in the same position as other states with comparable population growth rates. Moreover, despite their size differences, both the five-member Arizona Supreme Court and the seven-member Supreme Court of North Carolina have disposed of approximately the same percentage of cases in the past several years. In 2015, the Arizona Supreme Court only issued written opinions for about 2.9% of cases filed (31 out of 1,037).<sup>209</sup> The Supreme Court of

207. GA. APP. JURISDICTION REV. COMM'N, 2016 REPORT 6 (2016), [https://gov.georgia.gov/sites/gov.georgia.gov/files/related\\_files/press\\_release/Final\\_\\_Appellate%20Jurisdiction%20Review%20Commission%20Report.pdf](https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/press_release/Final__Appellate%20Jurisdiction%20Review%20Commission%20Report.pdf) [<https://perma.cc/25U2-HZQX>].

208. Press Release, U.S. Census Bureau, *supra* note 205.

209. ARIZ. CHAMBER OF COMMERCE & INDUS., *supra* note 191, at 1–2 (noting that the Arizona Supreme Court only issued written opinions for “31 of the 1,037 cases filed” in 2015).

North Carolina saw similar results in Fiscal Year 2013, in which it issued written opinions for 21 of the 657 petitions for review, totaling about 3.2%.<sup>210</sup> Thus, even with this two-person difference, the two courts were equivalently effective. These discrepancies therefore indicate that changing the way in which North Carolina justices *use* their time, not the number of people sitting on the court, is the best way to remedy judicial inefficiency.

### *B. Expense of Additional Justices*

A complementary factor that must be considered in the court-packing context is the cost that additional justices would impose on the public and the judicial branch. Although this appears to be an ancillary, less-cited concern of court-packing proponents and opponents alike, it is nonetheless something that must be considered—especially in states where judicial funding is already scarce—because it is inextricably tied to the two other factors.

#### 1. Adverse Financial Effects of Court-Packing

Since the nation's founding, the judiciary has been the most financially vulnerable branch of the government. As early as 1788, Alexander Hamilton cautioned that the federal judicial branch was “beyond comparison the weakest of the three departments of power” because it “has no influence over either the sword or the purse.”<sup>211</sup> Lately, as more states are struggling financially, these purses have been tightened—often at the expense of courts. According to comments by members of the ABA Task Force on the Preservation of the Justice System, which released a 2011 report regarding the general lack of funding for state courts, most state courts decreased funding by ten to fifteen percent in the years following the 2008 recession.<sup>212</sup> Another 2014 study found similar results: between 2009 and 2012, forty-three states reported budget cuts, forty states reported a budget shortfall, twenty-three states reduced court operating hours,

210. See 2013–2014 NCAOC REPORT, *supra* note 111, at 5, 7.

211. THE FEDERALIST No. 78, at 433–34 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

212. See Peter T. Grossi, Jr., Jon L. Mills & Konstantina Vagenas, *Future Trends in State Courts 2012: Crisis in the Courts: Reconnaissance and Recommendations*, 2012 NAT'L CTR. FOR ST. CTS. 83, [http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/Crisis\\_Grossi.ashx](http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/Crisis_Grossi.ashx) [https://perma.cc/MV2X-BK BK].



and twenty-two raised court fees and fines.<sup>213</sup> This data led the study's authors to despondently conclude, "The sad reality facing America is that many of our state court systems are so poorly funded that they are at a tipping point of dysfunction."<sup>214</sup>

Accordingly, while the financial impact of two additional state supreme court justices may sound insignificant, this extra expense may actually have long-lasting consequences. When judicial branches cannot afford such expansion, their effectiveness and efficiency may be jeopardized by their inability to meet caseload demands and failure to modernize their technologies.<sup>215</sup> Additionally, because judicial budgets "are typically 90 percent personnel expenses . . . cuts to judicial budgets have had a debilitating impact on available court days and all of the other functions that require *people* to work *immediately* on burgeoning caseloads."<sup>216</sup> Thus, because courts encompass "such a small portion of a state government's overall budget," even the most minor of budget cuts may still "trigger significant governmental, social, and economic costs."<sup>217</sup>

Yet, as exemplified by the lack of data regarding the cost of Georgia's court-packing bill, underfunded judiciaries remain largely unnoticed by both the public and the other branches of government, even despite the potentially destructive effects of this phenomenon.<sup>218</sup> There is no evidence indicating that Georgia's House Bill 927 will be accompanied by a budgetary increase, nor is there any available estimate of the additional cost imposed on the state's judicial branch. In fact, the Georgia Appellate Review Commission—which, in light of "[b]udget cuts, a docket backlog, and time constraints," was tasked with recommending a "realignment" of Georgia's appellate court system—considered but declined to include supreme court expansion

213. ERIC J. MAGNUSON, ET AL., DRI, THE ECONOMICS OF JUSTICE 8 (2014), <http://www.dri.org/docs/default-source/dri-white-papers-and-reports/2014-economics-of-justice.pdf?sfvrsn=10> [<https://perma.cc/FTU6-A359>].

214. *Id.* at 2.

215. See EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, ENCJ REPORT 2015-2016: FUNDING OF THE JUDICIARY 3–4 (2016), [https://www.encj.eu/images/stories/pdf/workinggroups/encj\\_2015\\_2016\\_report\\_funding\\_judiciary\\_adopted\\_ga.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/encj_2015_2016_report_funding_judiciary_adopted_ga.pdf) [<https://perma.cc/7LV6-W5B2>] ("To meet the present and future legitimate expectations of society, the judicial system must have the resources to innovate and modernize such as information and communication technology.").

216. Grossi, Jr. et al., *supra* note 212, at 83.

217. MAGNUSON, ET AL., *supra* note 213, at 5.

218. *Id.* at 2. According to a 2013 national poll, only forty percent of respondents believed that state courts were underfunded. *Id.*

in its list of recommendations.<sup>219</sup> Although the Commission did not expressly state that this decision was financially motivated, the enormous budgetary cuts to Georgia's judicial branch in recent years seem to indicate that the diminished judicial resources played at least some role.<sup>220</sup>

Arizona, in contrast, did at least address this factor in its court-packing law discussions. According to Arizona court-packing proponents, the state's new law will reportedly cost the state approximately \$1 million—a “tiny fraction” of Arizona's \$9 billion budget, all of which would go solely towards judicial and staff salaries.<sup>221</sup> Additionally, although Chief Justice Bales admonished the state's court-packing plan, he indicated that because the Arizona judicial branch was underfunded, “he would support the expansion as part of a larger effort to increase court funding and judicial salaries.”<sup>222</sup> Thus, in order to gain support from Chief Justice Bales and other anti-court-packing legislators, Arizona lawmakers passed a separate bill increasing funding for the Arizona Supreme Court and increasing the salaries of its judges by three percent over two years.<sup>223</sup> Accordingly, in Fiscal Year 2017, the Arizona Supreme Court's budget was increased by \$500,000 (plus the cost of two new full-time positions) to accommodate the two future justices, as well as \$10,600 for half of the judicial salary increase, equating to approximately 0.1% of the supreme court's total Fiscal Year 2017 budget.<sup>224</sup>

219. Bryan Janflone & Michael F. Williford, *HB 927 - Supreme Court, Appellate Court Efficiencies*, 33 GA. ST. U. L. REV. 205, 207 (2016). In its report, the Commission detailed the history of the supreme court's make-up, but did not recommend court-packing as a solution to the judicial branch's inefficiencies. See GA. APP. JURISDICTION REV. COMM'N, *supra* note 207, at 6–9.

220. Janflone & Williford, *supra* note 219, at 206 (explaining that in 2009, the Georgia legislature “enacted the most severe budget cuts endured by any state judiciary, slashing Georgia courts' budgets by twenty-five percent”). “In 2010 and 2011, the state budget included additional cuts to the judiciary[,]” which “led to a backlog of cases on Georgia's appellate court dockets.” *Id.*

221. ARIZ. CHAMBER OF COMMERCE & INDUS., *supra* note 191, at 3.

222. Raftery, *supra* note 59, at 7.

223. See James Myers III, *The State of Arizona's Supreme Court*, ARIZ. ADVOC. NETWORK (July 25, 2016), [http://www.azadvocacy.org/the\\_state\\_of\\_arizona\\_s\\_supreme\\_court](http://www.azadvocacy.org/the_state_of_arizona_s_supreme_court) [https://perma.cc/R2D7-KRMB]. The following Fiscal Year, the supreme court's budget increased again by \$425,000 (and the cost of six new full-time positions) as a result of the two new justices. See ARIZ. LEGISLATURE, FISCAL YEAR 2017 APPROPRIATIONS REPORT: JUDICIARY - SUPREME COURT, ARIZ. LEGISLATURE 248 (2016), <https://www.azleg.gov/jlbc/17AR/judspa.pdf> [https://perma.cc/V3HQ-5MWU].

224. See ARIZ. LEGISLATURE, *supra* note 223, at 248.

## 2. The Cost of Additional Supreme Court of North Carolina Justices

In North Carolina, given the current financial condition of the North Carolina judiciary, this factor also weighs against the implementation of court-packing legislation, as it would be preferable to introduce these additional expenses at a time when the financial condition of the judiciary is stronger. The actual cost of adding two supreme court seats includes two annual salaries—\$146,191 each, as of January 2017<sup>225</sup>—plus other fixed expenses associated with the justice position, including law clerk salaries, office space, and support staff salaries. Some observers have “conservatively” estimated that this increase would add at least \$500,000 to the North Carolina judicial branch’s budget.<sup>226</sup>

At first glance, this expense appears reasonable, especially if it is accompanied by a budget increase similar to that of Arizona. However, the current state of the North Carolina judicial branch sheds better light on the actual effect of this additional burden. As noted by Chief Justice Martin, the judiciary’s “operations budget is under tremendous stress, and we have been forced to rely on money available from vacant positions to cover shortfalls for basic functions such as payments to jurors, court reporters, and expert witnesses.”<sup>227</sup> As of 2015, North Carolina’s entire judicial budget was only \$464 million—less than three percent of the state’s total budget.<sup>228</sup> And as noted by Chief Justice Martin, this trend is nothing new, since “[o]ver the past twenty-five years, [North Carolina’s] commitment to the judiciary has not exceeded 3% of the state budget.”<sup>229</sup> Thus, although the cost of adding justices may seem low, the practical effect of this change would be to detract already scant funds from the “basic services” of the judiciary.<sup>230</sup> If these functions remain underfunded, the same inefficiency issues will arise: timely trials cannot be provided; offenders are not quickly apprehended, tried, or sentenced; and the public’s trust and confidence in the judicial branch is damaged.<sup>231</sup>

225. *How States Set Judicial Salaries*, SURV. OF JUD. SALARIES (Nat’l Ctr. for St. Cts., Williamsburg, Va.), Jan. 1, 2017, at 2, <http://www.ncsc.org/~media/Microsites/Files/Judicial%20Salaries/JST-2017-layout.ashx> [<https://perma.cc/K5EG-LSMS>].

226. Letter from N.C. Advocs. for Just. to the N.C. Senators, *supra* note 17, at 2.

227. Martin, *supra* note 201, at 5.

228. *Id.* at 5–6.

229. *Id.* at 6.

230. *Id.* at 5.

231. *Id.*

In addition to the difficulties posed by the already meager funds for the judiciary, the non-partisan, multi-disciplinary commission proposed by Chief Justice Martin, the NCCALJ, which was created to “ensure that the Judicial Branch conserves its valuable resources,”<sup>232</sup> has never recommended that the legislature add supreme court justices. Nowhere in any of its existing reports has the NCCALJ ever indicated that increasing the number of justices is an wise, let alone necessary, funding decision for the judicial branch. This silence stands in stark contrast to the Bell Report’s recommendations, which included a realistic and concrete financial plan.<sup>233</sup> Accordingly, although the General Assembly is by no means required to abide by the advice given by the judiciary or its counterparts, changing the size of the Supreme Court of North Carolina without a fiscal plan or concrete, objective recommendation is nonetheless strong evidence that the court-packing effort is politically motivated.

In sum, diluting the already-thin judicial budget with this additional cost would require the judiciary to further diminish the funding of other judicial programs that are fundamental to an operative court system. Without these basic functions, it does not matter how many justices sit on the supreme court—justice cannot be served by a court that lacks jurors, expert witnesses, proper technology, or well-trained staff. Thus, in order for this factor to shift in favor of court-packing proponents, any North Carolina court-packing plan must include a corresponding provision that allocates more financial resources to the judicial branch, similar to that of Arizona. But without a budget increase, this cost would be nearly impossible to justify given the current financial climate of the North Carolina judicial branch.

### C. *Effect on the Integrity and Independence of the Judicial Branch*

#### 1. Defining “Judicial Integrity”

As noted in the very first sentence of the North Carolina Code of Judicial Conduct, “[a]n independent and honorable judiciary is indispensable to justice in our society.”<sup>234</sup> Justice Anthony Kennedy

232. *Id.* at 6.

233. See BELL REPORT, *supra* note 102, at 46 (“The establishment of a unified and uniform court system necessarily requires that the courts be financed at the State level.”). And notably, at the time the Report was issued, budgetary constraints were less troubling, given that North Carolina’s income was steadily *increasing*. *Id.* at 9.

234. N.C. COURTS, N.C. CODE OF JUDICIAL CONDUCT (2015), <http://www.nccourts.org/Councils/JudicialStandards/Documents/Amendments-NCJudicialCode.pdf> [<https://perma.cc/LF8D-TFKE>].

succinctly explained why exactly the concept of judicial integrity is so “indispensable” in his concurring opinion in *Republican Party of Minnesota v. White*<sup>235</sup>:

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.<sup>236</sup>

Inherent in this “state interest of the highest order” is the idea of judicial independence. Although the meaning of this term has shifted throughout the course of history,<sup>237</sup> it can be broken down into two corresponding, but nonetheless distinct, facets. First is decisional independence, which is premised upon the idea that judges’ decisions should not be affected by outside political pressures.<sup>238</sup> More relevant to the court-packing analysis, however, is the concept of institutional independence. Because the judicial branch is a “coequal partner” of the legislative and executive branches, it must also “have the authority to govern and manage its internal affairs, free from undue interference by the other branches of government.”<sup>239</sup> Absent such independence, the judiciary can no longer safeguard against governmental oppression of individual liberties<sup>240</sup> or autocratic regimes. Moreover, since the judicial branch is devoid of any power to actually implement the decisions they produce, any diminution of

235. 536 U.S. 765 (2002).

236. *Id.* at 793 (Kennedy, J., concurring).

237. See generally G. Alan Tarr, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States*, in STANFORD STUDIES IN LAW AND POLITICS 3 (Keith J. Bybee ed., 2012) (describing the evolution of the meaning of “judicial independence and accountability in the states from the American founding to the present day”).

238. *Id.* at 89.

239. *Id.* at 91–92. But see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1–27 (1990) (arguing that the judicial branch has gradually intruded into the lawmaking process intended by the Framers to be strictly reserved to Congress); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2708 (2003) (explaining how John Marshall’s establishment of the judiciary as a co-equal branch is a “myth”).

240. THE FEDERALIST NO. 78, *supra* note 211, at 434 (“[T]he general liberty of the people can never be endangered . . . so long as the judiciary remains truly distinct from both the legislature and the executive.”).

judicial legitimacy further weakens this branch's ability to reach their policy goals.<sup>241</sup>

Because of the "indispensable" nature of judicial independence and integrity, any action that has even the slightest potential to undermine the court's fundamental role should not be taken lightly. Of course, judicial power is not absolute, as the other co-equal branches—as well as the general public—are vested with the power to scrutinize the decisions of the judiciary. However, when an outside actor makes changes to the judicial branch for political reasons, this not only violates the fundamental tenants of the judiciary but also jeopardizes the legitimacy of the entire government.

In the context of the court-packing debate, Roosevelt's 1937 plan provides the best example of the potential effect of court-packing legislation on the independence and integrity of the judicial branch. The controversial nature of the President's court-packing plan stemmed from the fact that it "forced the public to choose between the widely approved policies of an extremely popular president and the institutional integrity of a controversial Supreme Court."<sup>242</sup> This juxtaposition effectively forced American citizens in between a rock and a hard place. Those who approved of the plan were also supporting the erosion of the Court's most "indispensable" role as an independent body, while the plan's opponents permitted the country to fall even deeper into its post-Depression decline.<sup>243</sup> A similar choice seemed to be tacitly posed to the Court itself: either sacrifice its substantive policy decisions against Roosevelt, or risk upheaving the legitimacy of the branch altogether.<sup>244</sup>

Of course, this portrayal is overly simplistic in that it does not account for whether the President's actions were in fact necessary at the time given the polarizing actions of the Court leading up to this controversy. Nonetheless, the Court's "switch in time," the public outcry, and the complete lack of any legitimate federal court-packing attempts since 1937 serve to demonstrate the influence that judicial legitimacy truly plays in the overall court-packing debate.

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241. TOM S. CLARK, *POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS: THE LIMITS OF JUDICIAL INDEPENDENCE* 162 (2010).

242. Caldeira, *supra* note 47, at 1140.

243. *See id.*

244. *See id.* at 1139–40.

## 2. The Effect of a North Carolina Court-Packing Plan on Judicial Integrity

In the context of the North Carolina court-packing debate, this factor weighs most strongly against supreme court expansion and distinguishes North Carolina from other court-packing legislation. As discussed in Section II.C, the North Carolina General Assembly has been largely successful in its recent efforts to influence judicial elections. Since gaining control in 2011, Republicans on the North Carolina General Assembly have shown little hesitation in making controversial and politically motivated changes to the judicial branch, even when doing so patently diminishes the independence of the state's court system. Even assuming that the retention election law, ballot order law, and party affiliation laws were *all* originally passed for genuinely non-political reasons, there is no comparable, objective justification for their subsequent revisions and amendments. If, for example, a randomized ballot order for judicial elections was the “fairest system” in March 2017, how can it be plausibly argued that this was not the case in June 2016?

Overall, the legislature's actions have been swift, resourceful, and, most problematically, effective. As discussed in Section II.D.2, the General Assembly's concrete influence over the judicial branch can hardly be questioned in light of the 2016 election results. By controlling what information voters receive and how they receive it, the legislature can continue to ensure that judgeships remain occupied by their allies. The passage of the retention election law and elimination of judicial primaries are perhaps even more concerning, as they serve to remove North Carolina citizens from the judicial election process altogether. Yet, as explained in Section II.D.3, the fact that these actions erode the foundational principle of separation of powers appears inconsequential to Republican legislators, as there is no indication that this trend will reverse anytime soon. Thus, as noted by a University of North Carolina law professor, “[If] the North Carolina legislature went through with adding justices to the court, it would mean state government could literally control the courts, and it would undermine the courts' ability to be nonpartisan.”<sup>245</sup>

The public's reaction to these laws, however, is even more critical to this analysis than the legislature's unabashed willingness to propose and pass them. According to recent data, the perception of North Carolina's government, specifically the General Assembly, indicates that these actions have not gone unnoticed. Even before the

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245. Boughton, *supra* note 9.

November 2016 election, North Carolinians were displeased with the direction in which the state seemed to be headed. In an April 2016 poll of “likely” North Carolina voters—less than a third of which identified as either “very liberal” or “somewhat liberal”—58% of respondents felt that North Carolina “has gotten off on the wrong track,” while only 31% percent believed that the state was “headed in the right direction.”<sup>246</sup>

After the 2016 election, outside observers had similar (albeit, more extreme) pre-election perceptions of North Carolina’s government. In a 2016 report issued by the Electoral Integrity Project (“EIP”), North Carolina had one of the lowest “electoral integrity” scores of all fifty states.<sup>247</sup> Although the EIP’s global findings have been met with skepticism,<sup>248</sup> the report has nonetheless sparked a debate on the issue of North Carolina’s poor-quality elections. Based on the EIP’s data, one political scientist concluded, “North Carolina can no longer call its elections democratic.”<sup>249</sup> Although this

246. See *NC Civitas Poll April 2016*, N.C. CIVITAS 1 (Apr. 2016), <https://www.nccivitas.org/wp-content/uploads/2016/04/CivitasNCPollApril2016.pdf> [<https://perma.cc/AV8H-R54G>].

247. See Pippa Norris, et al., *Perceptions of Electoral Integrity: The 2016 American Presidential Election*, ELECTORAL INTEGRITY PROJECT (2016), <https://www.dropbox.com/s/v59olglbdv62vtv/PEI-US-2016%20Report.pdf?dl=0> [<http://perma.cc/5BBY-UHPN>]. Specifically, North Carolina ranked dead last—with a score of 7 out of 100—in the “district boundaries” category, and it also fell extremely low in the “voter registration” rankings. *Id.*

248. This project has been the subject of criticism for both its methodology and its alleged failure to take into account the realities of certain countries’ election processes. See Andrew Gelman, *The Bad Research Behind the Bogus Claim that North Carolina is No Longer a Democracy*, SLATE (Jan. 4, 2017, 7:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/01/the\\_bogus\\_claim\\_that\\_north\\_carolina\\_is\\_no\\_longer\\_a\\_democracy.html](http://www.slate.com/articles/news_and_politics/politics/2017/01/the_bogus_claim_that_north_carolina_is_no_longer_a_democracy.html) [<http://perma.cc/FW8F-FQLX>]; Dylan Matthews, *Political Scientist: North Carolina “Can No Longer be Classified as a Full Democracy”*, VOX (Dec. 27, 2016, 2:00 PM), <http://www.vox.com/policy-and-politics/2016/12/27/14078646/north-carolina-political-science-democracy> [<http://perma.cc/MFM2-N98Y>].

249. Andrew Reynolds, *North Carolina is No Longer Classified as a Democracy*, NEWS & OBSERVER (Dec. 31, 2016, 9:45 AM), <http://www.newsobserver.com/opinion/op-ed/article122593759.html> [<http://perma.cc/X8ET-QQGR>].



conclusion is widely disputed,<sup>250</sup> some observers still agree with the report's overall conclusions, despite its flaws.<sup>251</sup>

Perhaps most telling, however, are the most recent approval ratings of the North Carolina General Assembly. According to an August 2017 poll of North Carolina voters issued by Public Policy Polling—an admittedly left-leaning organization<sup>252</sup>—a mere 18% of respondents indicated that they approve of the job that the General Assembly is doing.<sup>253</sup> 58%, in contrast, disapproved of the legislature, while 25% were unsure.<sup>254</sup> More specifically, 55% of respondents had an “unfavorable” opinion of Republicans in the North Carolina legislature (compared to 32% who had a “favorable” one), and 46% had the same “unfavorable” view of Democratic lawmakers.<sup>255</sup>

This data therefore indicates that North Carolinians are paying attention to their elected representatives, and a majority of the state's constituents are growing increasingly unhappy with what they see. Even assuming that the legislature's actions played no role in the 2016 election, the mere *perception* that judges could be making decisions based on political pressure or personal bias still damages the integrity of North Carolina courts and the state government as a whole. Accordingly, any court-packing attempt in North Carolina would only

250. After it went viral, Reynolds' article was even subtly condemned by one of the study's own authors, who noted, “There is no independent and reliable measure of how U.S. states rank in terms of liberal democracy. But, moving beyond hearsay and anecdote, new evidence is available assessing the quality of elections.” Pippa Norris, *U.S. Elections Rank Last Among All Western Democracies*, ELECTORAL INTEGRITY PROJECT (Jan. 7, 2017), <https://www.electoralintegrityproject.com/eip-blogs/2017/1/7/its-even-worse-than-the-news-about-north-carolina-american-elections-rank-last-among-all-western-democracies> [http://perma.cc/X2AM-54N3].

251. See Adam Hamze, *North Carolina's Democracy Ranked on Par With Cuba*, HUFFINGTON POST (Jan. 3, 2017), [http://www.huffingtonpost.com/entry/north-carolina-no-longer-democracy\\_us\\_585db3e7e4b0de3a08f5699f](http://www.huffingtonpost.com/entry/north-carolina-no-longer-democracy_us_585db3e7e4b0de3a08f5699f) [http://perma.cc/BG5B-JVVL] (“Patsy Keever, chairwoman of the North Carolina Democratic Party, agreed with the report, saying that her state's current efforts at governing do not adhere to democratic principles.”); Matthews, *supra* note 248 (concluding that, despite the study's flaws, the EIP's research “does point the way for some sensible policies that improve democratic participation and are implemented by some of the best-performing states in the US”).

252. See Abbie Bennett, *People Split on McCrory Running for NC Governor Again in 2020, Poll Says*, NEWS & OBSERVER (Aug. 10, 2017, 8:40 AM), <http://www.newsobserver.com/news/politics-government/state-politics/article166332852.html> [http://perma.cc/X5DC-L3AL].

253. TOM JENSEN, PUB. POL'Y POLLING, NORTH CAROLINIANS STRONGLY OPPOSE DOJ CUTS; LIKE COOPER; DOWN ON TRUMP 4 (2017), [http://www.publicpolicypolling.com/wp-content/uploads/2017/09/PPP\\_Release\\_NC\\_80917.pdf](http://www.publicpolicypolling.com/wp-content/uploads/2017/09/PPP_Release_NC_80917.pdf) [http://perma.cc/RJ9Q-WGEH].

254. *Id.*

255. *Id.* Again, given that 41% of respondents identified as Democrats, 33% as Republicans, and 26% as Independent, political party could not have been the respondents' only consideration. *Id.* at 6.

exacerbate these negative public impressions and further diminish the independence of the judiciary.

Of course, that is not to say that court-packing should be permitted, so long as the public does not notice and the government has no track record of judicial interference. Rather, the purpose of this factor is to highlight the need for any court-packing plan to be concretely tied to a legitimate, non-partisan motive. Indeed, this factor was the clearest difference between the court-packing laws of Arizona and Georgia and those of its unsuccessful predecessors: Arizona and Georgia court-packing proponents were able to point to concrete, practical considerations, while other states' proposals were expressly linked to partisan goals. In the context of North Carolina, any attempt to justify a court-packing plan on non-political grounds would be futile—at least, without a larger caseload, additional funds, or a fundamental change in the operations of the North Carolina General Assembly.

#### CONCLUSION

If the recent upsurge in court-packing proposals continues, this phenomenon will have a detrimental and irreversible impact on the independence of the judicial branch. When partisan politics are injected into the judiciary, the public perception of the court system falters. A healthy, well-functioning judicial branch cannot exist without public confidence and decisional independence. Proposals to expand supreme courts, regardless of their underlying motivations, should therefore only be used as a last resort. Even when such expansion is the only plausible option, legislators still should take several non-partisan, objective factors into consideration before increasing the size of their supreme courts. If they fail to do so, they are not only at risk of alienating their constituency; they also place the entire doctrine of separation of powers at risk.

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